[redacted]

(20,794.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 391.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, APPELLANT,

vs.

BOISE CITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

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1 *Complaint.*

In the Circuit Court of the United States in and for the Central Division of the District of Idaho. In Equity.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Idaho:

The Boise Artesian Hot & Cold Water Company, Limited, a corporation organized and existing under the laws of the State of West Virginia, and citizens of said State, plaintiff in this suit, brings this its bill against Boise City, a municipal corporation organized and existing under the laws of the State of Idaho, and a citizen of said State of Idaho.

And thereupon your orator complains and says that it is a corporation organized and existing under the laws of the State of West Virginia and is engaged in the business of supplying the said defendant, Boise City, and its inhabitants with water for municipal and domestic purposes.

That on the third day of October, 1889, the Mayor and Common Council of said defendant, under authority contained in its charter, by an ordinance duly passed and approved on said day, granted to H. B. Eastman and B. M. Eastman, and their successors in interest, the right to lay and repair their water pipes in, through and along and across the streets and alleys of Boise City, under the surface thereof, for the purpose of supplying mountain water to the residents of said city, a copy of which ordinance is hereto annexed,
2 made a part of this bill and marked "Exhibit A."

That thereafter the said Eastmans duly accepted said ordinance and constructed a water works system, consisting of artesian wells and reservoirs, and proceeded to lay mains and pipes under and along the streets and alleys of said Boise City, and supplied the residents thereof with water for domestic purposes, in accordance with said ordinance.

That thereafter on March 28th, 1891, the Artesian Hot & Cold Water Company, Limited, a corporation, became the owner of said water works system and of all rights and franchises granted to said Eastmans under said ordinance.

That on the tenth day of July, 1890, the Mayor and Common Council of said defendant acting under authority of the general laws of the State of Idaho, relating to water and canal corporations, and under powers contained in defendant's charter, duly passed an

ordinance granting to the Artesian Water and Land Improvement Company, a corporation, and to its successors and assigns, the privilege of laying down and maintaining water pipes in the streets and alleys then paid out, or thereafter to be laid out and dedicated in said Boise City, a copy of which said ordinance if hereto annexed, made a part of this bill and marked "Exhibit B."

That the said Artesian Water and Land Improvement Company was a corporation duly formed under the laws of the State of Idaho, for the purpose of supplying said Boise City and its inhabitants, with water for public and family uses, and the franchise granted to said company by said last named ordinance was limited by the said laws relating to water and canal corporations to a period of fifty years from and after the date thereof, a copy of which said laws is hereto annexed, made a part hereof and marked "Exhibit B-1."

That thereafter the said Artesian Water and Land Improvement Company, duly accepted said ordinance and proceeded to
3 sink artesian wells, establish reservoirs and lay pipes under and along the streets and alleys of said city and to supply the inhabitants thereof with water for domestic purposes.

That thereafter on the 28th day of March, 1891, the said Artesian Water and Land Improvement Company, for and in consideration of $52,274.20, duly sold and conveyed to the said Artesian Hot & Cold Water Company, Limited, all of its real estate, rights of way, reservoirs, pipe lines, pipes, hydrants, stock on hand, franchises, privileges and appurtenances, connected with its water works, and also all of the rights and privileges granted to it and its successors and assigns by said Boise City by said ordinance of its Mayor and Common Council passed July 10th, 1890.

That the said Artesian Hot & Cold Water Company, Limited, was a corporation duly organized under the laws of Idaho, for the purpose of supplying said Boise City and its inhabitants with water for municipal and domestic use, and is the immediate predecessor in interest of your orator in its water works system.

That the Mayor and Common Council of said defendant on the 19th day of April, 1900, enacted a further ordinance in recognition of the rights of said last named company, wherein it was ordained, among other things, that the said Artesian Hot & Cold Water Company was thereby granted, by said Boise City, authority and permission to lay and maintain the pipes of said company in said City, and to supply water to said city and its inhabitants in the manner and according to the laws of Idaho, and said ordinance further enacted that the privilege and authority granted by said ordinance should continue for the same term provided for in the franchise theretofore granted by said city to the predecessors of the said Artesian Hot & Cold Water Company, Limited; a copy of which said ordinance is hereto annexed, made a part of this bill and marked "Exhibit C."

4 That the term for which said last named ordinance was by its terms to continue was to and until the tenth day of July, 1940.

That on August 28th, 1901, your orator became the owner by pur-

chase of the entire water works system and plant of said Artesian Hot & Cold Water Company, Limited, including all of its wells, reservoirs, pumping plants, pipe lines, pipes, real and personal property of every nature and also all of the rights privileges and franchises which had been granted to it and to its predecessors in interest by the ordinances of said Boise City, hereinbefore referred to.

That your orator was incorporated for the express purposes of furnishing water to said Boise City and its inhabitants for all useful and beneficial purposes, and taking, purchasing, acquiring, holding, operating and maintaining the rights and properties of water companies, associations or corporations, and of acquiring, using, owning and operating all the properties, franchises, rights, claims, privileges and everything belonging to said Artesian Hot & Cold Water Company, Limited, and to be the successors in every respect of the said corporation, and your orator's charter provides that its period of existence as a corporation shall be until September first A. D. 1950.

That between the said 3rd day of October, 1889, and the 28th day of March, 1891, the date when said water works system and properties were acquired by said Artesian Hot & Cold Water Company, Limited, the said Boise City contained a population of about three thousand persons, and the value of the water works system and plant originally constructed by said Eastmans and the amount invested in said system during said period, did not exceed twenty thousand dollars.

That during the time between said 28th day of March, 1891, and the 28th day of August, 1901, when the said water works system and properties were owned and operated by said Artesian Hot & Cold Water Company, Limited, the population of said Boise City more than doubled, and the area thereof was greatly increased by the laying out and platting of additions and subdivisions of territory which were settled upon and occupied, and the said company extended its pipe lines from time to time and supplied the said additions with water to meet the demands therefor. That during said period said company laid about fifteen additional miles of cold water pipe lines, constructed two wells and one reservoir for cold water, erected a large steam pumping plant with a capacity of three million gallons per day and made improvements to its cold water plant aggregating in cost and value more than one hundred and ninety-two thousand dollars.

That since the said 28th day of August, 1901, when your orator acquired said property and water works, as aforesaid, the said Boise City, has grown from a population of about six thousand to over twenty-one thousand inhabitants and in consequence of such growth and for the health of its inhabitants and protection of their property, large extensions to your orator's cold water works system were required, and your orator has laid about twenty miles of mains, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one half million gallons of water per day and has ex-

pended on said cold water system more than one hundred thousand dollars.

That your orator and its predecessors in interest have at all times supplied pure, fresh and healthful water to said defendant and its inhabitants, and have in all respects complied with said ordinances and laid their pipes in a workmanlike manner and properly filled with convenient speed all excavations made for pipes and have left all streets and alleys in, through and along which they have laid their pipes, in as good condition as they found the same and
6 have always promptly repaired all damage done by them or their pipes, or by water escaping therefrom, and your orator and its predecessors in interest have, at all times since the enactment of said ordinances, complied with all of the terms and conditions thereof, and no complaint with respect to any of these matters has ever been made against your orator or its predecessors by said city or its inhabitants.

And your orator further avers, that the use by itself and its predecessors of the streets and alleys of said city during the past seventeen years has been at all times legal and under authority of said ordinances and the supplying of such pure, fresh and healthful water to said city and its inhabitants was and is an important public service and in all respects of great benefit and advantage to said city and its inhabitants and was the consideration for which said city granted said franchises to your orator and its predecessors in interest, and it was upon the faith of said ordinances and franchises that your orator and its predecessors in interest made the expenditures aforesaid, and there is at present no other means or cource available to said city for obtaining such water except from the said system owned and operated by your orator, but your orator and its predecessors in interest have at no time claimed and do not now claim that their franchises for the use of said streets and alleys and the supplying of said water, are perpetual or exclusive.

That the rates charged by plaintiff and its predecessors for water *has* always been in accordance with the rates established in the manner required and provided for by the statutes of Idaho.

That on the 11th day of May, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and the Act approved March 9th, 1905, amendatory thereof, two commissioners were appointed by the Mayor and Common Council of said defendant, and two commission-
7 ers were thereafter appointed by your orator for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City.

That said commissioners duly met and organized and continued in session over two months, and adopted a schedule of rates to be charged by your orator for all of said purposes, as required by said statute. That the defendant and your orator were represented by counsel before said commission and a large amount of evidence was introduced and the said commission carefully investigated the value of your orator's water works plant and reasonable operating expenses thereof and fixed rates to be charged said city and its inhabitants for water at figures which were intended to yield to your orator a net return of

six per cent. per annum, upon the then valuation of its plant, and your orator avers that said rates have not up to the present time and will not, in the future, to the best of your orator's information and belief, yield to your orator any larger net return.

That the said schedule of rates, adopted by said commission went into effect on the first day of August, 1905, and was accepted by your orator and defendant, and ever since have been and now are in full force and effect, and have never been repealed or modified, and, under the provisions of said statutes, will continue in force for three years from said date and until new rates are established in accordance therewith.

That your orator has at all times acquiesced in the rates fixed by said commission and regulated its charges in accordance therewith.

That despite the existence of said ordinances, and in total disregard of your orator's rights and without any just reason therefor, the common council of defendant, on the 31st day of May, 1906,
8 passed an ordinance entitled "An ordinance requiring the Boise Artesian Hot & Cold Water Company, a private corporation, organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300.00 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city."

That the said ordinance was vetoed by the Mayor of said defendant on the 2nd day of June, 1906, and was passed by said Common Council over the Mayor's veto on the 7th day of June, 1906.

That the said ordinance purports to levy a monthly tax or license of three hundred dollars against your orator for the privilege of laying, repairing and maintaining its water pipes in the streets and alleys of said Boise City, a copy of which ordinance is hereto attached, made a part of this bill and marked "Exhibit D."

And your orator avers that there are numerous other individuals, associations and corporations using the streets and alleys of said Boise City for the supplying of water for irrigation purposes, electric light and power, and for street railroad, telegraph and telephone purposes, none of whom are required by defendant to pay any license or tax for the privilege of using said streets and alleys.

And your orator further shows that the said charge levied in said ordinance against your orator was not considered or contemplated by the said commission in fixing the rates charged by your orator for water.

And your orator further charges that the defendant and its Common Council have claimed and still maintain and insist that your orator's right to use the streets of said Boise City is a license only which is subject to annulment and revocation at the will of the municipal authorities of defendant, and that said authorities
9 have the right to compel your orator to discontinue the use of said streets and alleys, or to levy burdens and assessments upon your orator at the pleasure of said authorities, for the privilege of using the same, and defendant threatens and intends to impose

further burdens and assessments on your orator for such use and to interfere with such use by your orator of said streets and alleys, and has threatened to remove its pipes from said streets and alleys and its works from said city.

That under instructions from said Common Council of defendant, your orator has been presented monthly with bills from said defendant for the amount of said tax and threatened with suits for collection thereof, and on the 6th day of December, 1906, the Common Council of defendant passed an ordinance ordering and requiring the proper officers of said defendant to institute an action for the collection of the sums alleged to be due to defendant under the provisions of said ordinance enacted on June 7th, 1907, as aforesaid, a copy of which ordinance of December 6, 1906, is hereto annexed, made a part of this bill and marked "Exhibit E."

That on the 13th day of December, 1906, said defendant commenced an action at law against your orator in the District Court of the Third Judicial District of Idaho, in and for Ada County, to collect the sum of seventeen hundred and thirty dollars, alleged to be due from your orator to defendant up to the first day of December, 1906, by reason of said ordinance of June 7, 1906, which action is not yet at issue, and on the 31st day of December, 1906, said defendant through its city clerk made a further demand in writing upon your orator for the sum of three hundred dollars for license alleged to be due from your orator for the use of said streets for the month of December, 1906, and your orator is informed and believes and therefore alleges the fact to be that said defendant will continue to present bills to your orator from month to month and demand payment of said sum claimed by defendant, and unless the same is paid will continue to sue your orator from time to time and a multiplicity of suits will thereby result, unless your orator is accorded the relief prayed for herein.

Your orator further avers that the passage of the said ordinances of June 7, 1906, and December 6, 1906, and the subsequent proceedings taken thereunder as aforesaid, were unjust, inequitable, oppressive and illegal and greatly to your orator's injury and damage.

And your orator further avers that the said ordinances of June 7, 1906, and December 6, 1906, have cast clouds upon your orator's franchises and right to use and occupy the streets and alleys of said Boise City and its right to supply said city and its inhabitants with water and thus tend to greatly depreciate the value of your orator's property, impair its credit, embarrass its business, and reduce its net revenue to an extent which will be unfair and unjust and which will amount to confiscation of your orator's property.

That the enforcement of said ordinances as threatened and intended by defendant will impair and destroy the franchises and contract rights under and upon the faith of which your orator and its predecessors in interest have made the large expenditures aforesaid, and under which they had constructed, maintained and were and under which your orator is, now operating its water system and that both of the said ordinances are therefore in contravention of the provisions of Article I, section 10, of the Federal Constitution,

forbidding any legislation impairing the obligations of contracts, and are invalid.

That the enforcement of said ordinances will deprive your orator of its property without due process of law, deny to your orator the equal protection of the laws, and abridge the privileges and
11 immunities of your orator in violation of the Federal Constitution and the Fourteenth Amendment thereto.

And your orator further avers that the said ordinance of June 7, 1906, is in violation of the constitution and laws of the State of Idaho, in that it amounts to double taxation of the property of your orator, and is unreasonable and oppressive and beyond the legislative power of said City council.

And your orator further shows that among the rates fixed by said commission under said statutes, to be charged by this plaintiff for water, there was established the following rate to be paid monthly:—

"Monthly Water Rates.

. . . . . .

"Fire Hydrants: $3000 per annum for the fire hydrants now in use, and $3.50 monthly for each additional hydrant hereafter established, under conditions in supplementary report."

That a copy of the said supplementary report containing the conditions referred to is hereto annexed, made a part of this bill, and marked "Exhibit F."

That your orator has at all times since said rates have been in force, maintained the required pressure for fire purposes and complied with all of the conditions contained in said report, and has at all times supplied the defendant with water for fire purposes.

That during all of the times since the said rates went into effect the number of fire hydrants in use by said city has been ninety, and the said defendant has used the water from your orator's mains and pipes for fire purposes, and paid to your orator the rates fixed therefor by said commissioners, up to the first day of May, 1906.

That since said first day of May, 1906, the said defendant and its common council have neglected and refused to allow or pay any of the bills of your orator for water for fire purposes, although your orator has presented regular monthly bills therefor
12 and made frequent demands on defendant for the payment thereof, and since said last-named date the defendant has used the said water at a large number of fires and said water has been available for use at all times by said defendant, and your orator avers, upon information and belief that the reason said defendant does not pay said bill for fire service, is because of the refusal of your orator to pay said monthly license tax attempted to be imposed by said ordinance.

And your orator charges that there is now due, owing and payable from said defendant to your orator, on account of the said water furnished and services performed for fire purposes the sum of two thousand dollars.

And your orator furthr shows, as it is informed and believes, that said defendant and its authorities disclaim any liability or obligation on the part of said defendant, to pay your orator the rates fixed by said commission, or any sum whatever for water used by defendant for fire purposes or for other great necessities for which said defendant may use said water and that defendant and its authorities allege and pretend that that part of the report of said water commission, fixing rates for those purposes is void and of no force and effect, whereas, your orator charges the contrary to be the truth, and that the report of said commission is in full force and valid and binding upon said defendant as well as upon your orator.

But now so it is, may it please your honors, that the said defendant as your orator is informed and believes, well knowing these facts and the rights of your orator, as aforesaid, and combining and confederating with divers persons, to your orator unknown and contriving to injure your orator and embarrass it in the exercise of its rights, privileges and franchises by virtue of which it is carrying on its business, is by unlawful and wrongful means seeking to reduce your orator's net income from its business to an amount
13 considerable less than that fixed by said commission and which would be entirely inadequate and unfair and which would amount to confiscation of your orator's property, and is seeking to impair your orator's credit and destroy the value of its property, and still continues so to do, all of which acts and things are contrary to equity and good conscience and tend to the manifest injury of your orator in the premises.

And your orator further avers that this is a suit arising under the constitution of the United States and that the matter in dispute, exclusive of interest and costs exceeds the sum *of* or value of two thousand dollars.

For as much as your orator can have no adequate relief, at and by the strict rules of common law, and can only have relief in a court of equity, and to the end therefore that the defendant may, if it can, show why your orator should not have the relief herein prayed, and may make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And your orator prays that it may have the decree of your honorable court, adjudging and decreeing that the said ordinances so accepted and acted upon by your orator and its predecessors in interest and under which it is using and occupying defendant's streets and alleys and supplying water to defendant and its inhabitants, are valid and subsisting contracts, binding upon said city as well as upon your orator and that the said ordinance of June 7, 1906, be adjudged and decreed to be illegal and void and that the same be cancelled and annulled, and all subsequent proceedings of defendant based thereon be held to be invalid; and that the defendant city be restrained from

enforcing said ordinance of June 7, 1906, and from inter-
14 fering with your orator in the legal use according to its franchises of said streets and alleys.

And your orator further prays that it be adjudged and decreed that the rates fixed and established by the said water commission, relating to said uses by defendant be declared legal and valid, and that your orator do have and recover of and from said defendant the said sum of two thousand dollars owing and unpaid by defendant therefor to your orator together with interest thereon, and your orator's costs and disbursements herein, and that your orator may have such other and further relief as may be proper in the premises.

May it please your honors to grant unto your orator a writ of subpœnae of the United States of America, directed to said defendant, commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seems proper and required by the principles of equity and good conscience.

EDGAR WILSON AND
JOHNSON & JOHNSON,
Solicitors for Plaintiff, Boise, Idaho, Where Papers Are to be Served on Plaintiff.
THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LTD.,
By C. W. MOORE, *President.*

RICHARD H. JOHNSON,
Of Counsel.

[SEAL.]

Attest:
B. S. HOWE, *Secretary.*

15 UNITED STATES OF AMERICA,
District of Idaho, County of Ada, ss:

On this 10th day of January, 1907, before me personally appeared Benjamin S. Howe, the Secretary of the Boise Artesian Hot & Cold Water Company, Limited, the plaintiff above named who being by me first duly sworn, deposes and says that he is the Secretary of the Boise Artesian Hot & Cold Water Company, Limited, and familiar with its business and affairs, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be on information or belief, and as to those matters he believes it to be true.

B. S. HOWE.

Subscribed and sworn to before me this 10th day of January, 1907.

RICHARD H. JOHNSON,
Notary Public.

[SEAL.]

16 "EXHIBIT A."

An Ordinance Granting Eastman Brothers the Right to Lay Water Pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, ordain:

SECTION 1. H. B. Eastman and B. M. Eastman and their successors in interest in their water works, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

SECTION 2. This Ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889.

17 "EXHIBIT B."

An Ordinance Granting to the Artesian Water and Land Improvement Company the Right to Lay Water Pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

SECTION 1. The privilege of laying down and maintaining water pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

SECTION 2. All water pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

SECTION 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

18 "EXHIBIT B-1."

Water and Canal Corporations.

Revised Statutes of Idaho, Section 2710. No corporation formed to supply any city of town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts, so made are valid and binding in law, but do not take from the city or town the right to regu-

late the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.

Section 2711, as amended by the Act of March 9, 1905. All corporations supplying water to towns or cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use and domestic purposes so long as its supply permits, without distinction of person, upon proper demand therefor, under such reasonable rules and regulations as the company or corporation may, from time to time, establish; and must also furnish water to the extent of its means in case of fire or other great necessity, said water to be furnished as above specified at reasonable rates to be established as hereinafter specified.

The rates to be charged for water must be determined by commissioners to be elected as follows: Two, by the city or town authorities, or when there are no city or town authorities, then by the Board of County Commissioners of the county, the two said commissioners so elected to be taxpayers of such town or city; two other commissioners shall be selected by the water company or corporation;
and in case a majority of the four commissioners so selected
19 can not agree as to the rates to be fixed, they must select a
fifth commissioner who must also be a taxpayer, and if they can not agree, upon a fifth commissioner, then the probate judge of the county must select a fifth commissioner, qualified as aforesaid. The decision of a majority of the commissioners thus selected must fix and determine the rates to be charged for water for all uses and purposes heretofore specified, and for the ensuing three years from the date of such decision, and until new rates are established as herein provided.

Section 2712, as amended by the Act of March 9, 1905. Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right-of-way within the city or town, and subject to the reasonable rules and directions of the Board of County Commissioners as to the mode and manner of using any right-of-way outside the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city of town, or the public roads and highways within the county, as may be necessary for the paying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and acqueducts in conducting water from outside points to the corporate limits of said city or town.

20 "EXHIBIT C."

An ordinance granting authority to the Artesian Hot and Cold Water Company, a corporation, organized and existing under and by virtue of the laws of the State of Idaho, to furnish and supply water to Boise City and the inhabitants thereof, to lay and maintain the pipes of said company in the streets and highways, to operate, carry on, and conduct the water works and business of said company in said city, and demanding of said company to furnish water free of charge to the full extent of their means to said Boise City for fire purposes and the sprinkling of the streets for said city.

Whereas, Boise City, Idaho, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and,

Whereas, the Artesian Hot and Cold Water Company is a private corporation organized, existing and operating under the laws of the State of Idaho and has been existing and operating as such corporation for a period of more than seven years, and

Whereas, said Boise City is greatly in need of water to be used for fire purposes and sprinkling of the streets in said city,

Now, therefore, the Mayor and Common Council of Boise City, Idaho, do ordain:

That the Artesian Hot and Cold Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho and the Ordinances of said Boise City, is hereby granted, by said Boise City, authority and permission to lay and maintain the pipes of said company in said city and to supply water to said city and the inhabitants in the manner and according to the laws of Idaho.

That demand is hereby made by said Boise City of and from said Artesian Hot and Cold Water Company to furnish, free of
21 charge, sufficient water to the full extent of the means of said company for fire purposes and for the sprinkling of the streets in said Boise City.

That the privilege and authority granted by this Ordinance shall continue for the same term provided for in the franchise, heretofore granted by said city to the predecessors of the said Artesian Hot and Cold Water Company.

This Ordinance shall take effect and be in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 19th day of April, 1900.

Approved by the Mayor.

22 "EXHIBIT D."

An ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation, organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

Whereas, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

Whereas, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

Whereas, said Boise City, on the 3rd day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their water works, a license for an indefinite period to lay and repair water pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said water works,

Now, therefore, Boise City does ordain as follows:

SECTION 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said water works now being operated and said license granted by

23 said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300 required by Section 1 of this Ordinance.

SECTION 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

SECTION 5. This Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2nd, 1906.

Passed over the Mayor's veto June 7th, 1906, by a vote of 8 ayes: 3 Noes.

Attest:
EMILY L. SAVIDGE,
City Clerk.

24 "EXHIBIT E."

An ordinance ordering and requiring the proper officers of Boise City, Idaho, to institute an action forthwith in any court of competent jurisdiction for the enforcement and collection of all sums or amounts of money due said Boise City, under the provisions of ordinance 678, enacted and approved by said City on June 7, 1906.

Boise City does ordain as follows:

SECTION 1. That the proper officers of Boise City, Idaho, are hereby instructed, required and ordered to institute forthwith an action for and on behalf of and in the name of said Boise City in any court of competent jurisdiction for the enforcement and collection of all sums or amounts of money due said Boise City, under provisions Ordinance 678, enacted and approved by said Boise City, on June 7, 1906.

SECTION 2. This Ordinance shall take effect and be in force from and after its passage and approval.

Passed by the Common Council of Boise City, Idaho, this 6th day of December, 1906.

Approved by the Mayor of Boise City, Idaho, this 6th day of December, 1906.

Approved:
JAS. A. PINNEY, *Mayor.*

Attest:
E. L. SAVIDGE,
City Clerk.

25 "EXHIBIT F."

Supplementary Report of the Water Commission.

To the Hon. James A. Pinney and the members of the City Council of Boise City.

GENTLEMEN: In the report of this committee relative to the use of water for fire purposes the rate was fixed as follows:

Three thousand ($3,000) dollars, per annum for fire hydrants now in use and $3.50 monthly for each additional hydrant hereafter

established under the conditions set forth in the supplementary report. In fixing the rate for this purpose it is essential to know what service is to be rendered by the Water Company and the commission has therefore specified the following conditions:

1. The upper reservoir in Hull's Gulch situated at an elevation of approximately 169 feet above Main Street is to be kept constantly filled with water.

2. A steam pressure of at least sixty pounds is to be constantly maintained in the boilers and pumps at the pumping station near the Natatorium and fires must be continuously kept under the boilers.

3. Telephone service between the fire stations, the Natatorium, the reservoirs in Hull's Gulch and the Water Company office must be maintained by the Water Company. The telephone rentals and fire stations being however paid for by the city.

4. The fire alarm system is to be extended to the Natatorium and the Hull's Gulch reservoir. The portion of the alarm system outside of the city limits to be paid for and maintained by the Water Company. The Water Company must keep competent persons
26 constantly in charge both at the pumping house and the Hull's Gulch reservoir and at every alarm of fire, unless otherwise directed, immediately cause the gates from the upper Hull's Gulch reservoir to be opened and cause the pressure at the pumps to be increased to 75 pounds or such greater amount as may be hereafter specified by the chief of the fire department; but whenever directed by the chief of the fire department the gates in Hull's Gulch reservoir shall be closed and the pressure at the pumping station shall be increased to the limit of its capacity. The persons in charge as above specified must keep within hearing distance of the fire alarm gongs at their respective stations.

5. In all cases when directed by the chief of the fire department the Water Company must cause the gates to be so closed or adjusted as to confine the water pressure to the immediate locality of the fire. In addition to installing the fire alarm at the pump house and at the Hull's Gulch reservoir the Water Company must cause the persons in charge of said places to be immediately notified of every fire by telephone. The Water Company must keep 550,000 gallons of water constantly in storage for use in case of fire.

6. The Water Company must at all times keep its plant including pumps, pipes, reservoirs and hydrants in condition for effective use in case of fire. The duty to make frequent tests of hydrants and to make immediate report of defects to the Mayor and to the Water Company shall however rest upon the fire department.

In prescribing the above conditions the commission has intended to fix a rate for the best service which can be obtained from the present water system and in case that service is not rendered and the standard here fixed maintained no payment shall be made. The rate fixed for water includes the use of water in any necessary fire drills or tests which may be required by the chief of the fire department.

27 The commission recommends that an ordinance be passed requiring lawn sprinkling to cease during fires and also that the fire alarm system be considerable extended.

Endorsed: No. 278. In the Circuit Court of the United States in and for the District of Idaho, Central Division. The Boise Artesian Hot & Cold Water Company, Limited, a corporation, Plaintiff, *vs.* Boise City, a municipal corporation, Defendant. Bill of Complaint. (In Equity.) Filed Jan. 11, 1907. A. L. Richardson, Clerk. Edgar Wilson, Esq., and Johnson & Johnson, Solicitors and of Counsel for the Plaintiff.

28 In the Circuit Court of the United States for the Central Division of the District of Idaho.

No. 278. In Equity.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Complainant,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Subpœna ad Respondendum.

The President of the United States of America to Boise City, a municipal corporation, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the Court Room thereof, in Boise, in said District, on the first Monday of February next, which will be the fourth day of February A. D. 1907 to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein The Boise Artesian Hot & Cold Water Company, Limited, a corporation, is complainant and you are defendant and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the Seal of our said Circuit Court, affixed at Boise in said District, this 11th day of January in the year of our Lord One Thousand nine Hundred and seven and of the Independence of the United States the One Hundred and thirty-first.

[SEAL.] A. L. RICHARDSON, *Clerk*,

By —— ——.

Memorand m pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The Defendant is to enter his appearance in the above entitled suit in the Office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso*.

[Endorsed:] No. 278. In the Circuit Court of the United States for the Central Division of the District of Idaho. In Equity. Boise Artesian Hot & Cold Water Company, Ltd., *vs.* Boise City, a municipal corporation. *Subpœna ad respondendum.* Returned and Filed Jan. 11th, 1907. A. L. Richardson, Clerk, by —— ——.

I hereby certify that I received the within *subpœna ad respondendum*, at Boise, Ada County, Idaho, on January 11th, 1907, and that I served the same upon Boise City, a municipal corporation, by handing to and leaving with James A. Pinney, Mayor of said Boise City, a municipal corporation, personally, a duplicate of said *subpœna ad respondendum* together with a certified copy of the complaint at Boise, Ada County, Idaho, on January 11th, 1907.

R. ROUNDS,
U. S. Marshal,
By JNO. JACKSON, *Deputy.*

Boise, Idaho, January 11th, 1907.

29 *Appearance of Defendant.*

In the Circuit Court of the United States for the Ninth Circuit in and for the Central Division of the District of Idaho.

No. 278. In Equity.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Appearance of Defendant.

To the Clerk of the above entitled Court:

I hereby enter my appearance as Solicitor and Counsel for the Defendant in the above entitled suit.

February 4, 1907.

CHARLES P. McCARTHY,
Solicitor and Counsel for Defendant, Residing at Boise City, Idaho, Where Papers Are to be Served on Defendant.

Endorsed: No. 278. Circuit Court of the United States, District of Idaho, Central Division. Boise Artesian Hot & Cold Water Co., Ltd., a corporation, Plaintiff, *vs.* Boise City, a municipal corporation, Defendant. Appearance of Defendant. Filed Feb. 4, 1907, A. L. Richardson, Clerk. Charles P. McCarthy, Solicitor and Counsel for defendant.

30 *Stipulation.*

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

No. 278. In Equity.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, *Defendant,*
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Stipulation.

It is hereby stipulated by and between the solicitors for complainant and defendant that defendant shall have until March 9th, 1907, in which to demur and answer or otherwise plead or to make any motion with reference to the pleadings herein, provided that said cause shall be heard at the March, 1907, term.

JOHNSON & JOHNSON &
EDGAR WILSON,
Solicitors for Complainant, Residing at Boise, Idaho.
CHARLES P. McCARTHY,
Solicitor for Defendant, Residing at Boise, Idaho.

Endorsed: No. 278. Circuit Court, U. S. District of Idaho, Central Division. Boise Artesian Water Co., *vs.* Boise City. In Equity. Stipulation Extending Time to Plead. Filed March 4, 1907, A. L. Richardson, Clerk.

31 *Order.*

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

No. 278. In Equity.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Order.

It appearing that the solicitors for the respective parties in the above entitled suit have stipulated that defendant shall have until March 9th, 1907, in which to demur and answer or otherwise plead

herein or make any motion with reference to the pleadings herein, provided that said cause shall be tried at the March, 1907, term, which stipulation has been filed in the above entitled suit, it is hereby ordered that defendant shall have until March 9th, 1907, in which to demur, answer or otherwise plead or to make any motion with reference to the pleadings herein, in accordance with the condition of said stipulation.

JAS. H. BEATTY, *Judge.*

In signing this order it must not be understood that I agree to try the above or any other case.

BEATTY, *J.*

Endorsed: No. 278. Circuit Court, U. S. District of Idaho, Central Division. Boise Artesian Water Co., *vs.* Boise City. In Equity. Order extending time to plead. Filed March 4, 1907, A. L. Richardson, Clerk.

32 *Demurrer.*

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

No. 278. In Equity.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Demurrer.

The demurrer of the defendant, Boise City, to the bill of complaint of the Boise Artesian Hot and Cold Water Company, Limited, complainant.

To the Judges of the Circuit Court of the United States for the District of Idaho:

This defendant, Boise City, by protestation not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of said demurrer states the following, to-wit:

First.

That said complainant has not in and by its said bill made and stated such a case as entitles it in a court of equity to any relief from or against this defendant toughing the matters contained in the said bill or of any such matters.

Second.

That the complainant has not in and by its bill stated such a case as entitles it to any relief whatever in a court of equity, and that there is no equity in said bill.

33

Third.

That it appears by the complainant's own bill that it is not entitled to relief in a court of equity, and said bill fails to show the complainant has been authorized by ordinance of Boise City or by contract entered into between the defendant and the complainant to supply water to the inhabitants of Boise City or the defendant or to do business as a water corporation within the limits of Boise City as required by the laws of the State of Idaho.

Fourth.

That complainant wholly fails to show by its said bill of complaint that it is authorized or empowered to carry on the business of furnishing water to the inhabitants of Boise City for compensation.

Fifth.

That it does not appear from said bill of complaint that any term was fixed in the ordinances referred to in said bill of complaint granting the privilege to the complainant or its alleged predecessors in interest, of laying and maintaining water pipes in Boise City, for the duration of said privilege; nor does it appear that there ever was or is now any contract made between said City and the grantee of the said alleged privilege, nor does it appear that the laws of the State of Idaho fixed any term for the duration of the alleged privilege.

Sixth.

As to so much and said part of said bill as is contained in paragraph 3 on page 4 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Seventh.

As to so much and said part of said bill as is contained in paragraph 4, on page 4 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any
34 statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Eighth.

As to so much and said part of said bill as is contained in paragraph 1 on page 5 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Ninth.

As to so much and said part of said bill as is contained in paragraph 2 on page 5 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Tenth.

As to so much and said part of said bill as is contained in paragraph 3 on page 5 of said bill and the continuation of said paragraph on page 6 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Eleventh.

As to so much and said part of said bill as is contained in paragraph 1 on page 6 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issue sought to be made by complainant's bill.

Twelfth.

As to so much and said part of said bill as is contained in paragraph 2 on page 6 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

35 Thirteenth.

As to so much and said part of said bill as is contained in paragraphs 1, 2, 3 and 4 on page 7 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Fourteenth.

As to so much and said part of said bill as is contained in paragraph 4 on page 8 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Fifteenth.

As to so much and said part of said bill as is contained in paragraph 5 on page 8 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Sixteenth.

As to so much and said part of said bill as is contained in paragraph 3 on page 11 of said bill, defendant demurs thereto and

shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Seventeenth.

As to so much and said part of said bill as is contained in paragraph 5 on page 11 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not contain any statement of facts or allegations pertinent to any issue sought to be made by complainant's bill.

Eighteenth.

As to so much and said part of said bill as is contained in paragraphs 1, 2, 3 and 4 on page 12 of said bill, defendant demurs thereto and shows that the same is irrelevant and does not
36 contain any statement of facts or allegations pertinent to any issues sought to be made by complainant's bill.

Nineteenth.

That said complainant has not, as appears by said bill of complaint, made out any title or right to the relief prayed for.

Wherefore, and for divers and other good causes of demurrer to the hearing of the said complaint, the defendant demurs thereto, and humbly demands judgment of this Honorable Court whether it shall be compelled to make any further or other answer to the said bill, and that it humbly prays to be hence dismissed with its costs and charges in this behalf, most wrongfully sustained.

CHARLES P. McCARTHY,
Solicitor and of Counsel for Defendant, Boise City, Idaho.

Office, Rooms 1 & 2, Pioneer Bldg. where papers are to be served upon defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

CHARLES P. McCARTHY,
Of Counsel for Defendant, Boise City.

STATE OF IDAHO, *County of Ada, ss:*

James A. Pinney being first duly sworn deposes and says: I am the duly elected, qualified and acting mayor of Boise City, Idaho, the defendant; that the foregoing demurrer is not interposed for delay.

JAMES A. PINNEY.

Subscribed and sworn to before me this 9th day of March, 1907.

JOHN J. BLAKE,
[SEAL.] *Notary Public.*

Service of copy of the above Demurrer acknowledged this Ninth day of March, 1907.

JOHNSON & JOHNSON AND
EDGAR WILSON,
Solicitors for Plaintiff, Boise Artesian Hot & Cold Water Co., Ltd.

37 Endorsed: No. 278. Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division. Boise Artesian Hot & Cold Water Co., Ltd., Plaintiff, *vs.* Boise City, a municipal Corporation, Defendant. In Equity. Demurrer of Deft. Edgar Wilson and Johnson & Johnson, Solicitors for Plaintiff; Charles P. McCarthy. Solicitor and of Counsel for Defendant. Filed March 9, 1907, A. L. Richardson, Clerk.

38 *Appearance of Defendant.*

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

No. 278. In Equity.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Appearance of Defendant.

To the Clerk:

We hereby enter our appearance as solicitors and counsel for defendant in the above entitled suit.

Dated March 25, 1907.

BORAH, CAVANAH & BLAKE,
Solicitors and Counsel for Defendant.

Residences, Boise City, Idaho.

Endorsed: No. 278. In the circuit court of the United States, in and for the Central Division, of the District of Idaho. The Boise Artesian Hot and Cold Water Company, Limited, a corporation, Plaintiff, *vs.* Boise City, a Municipal corporation, Defendant. Appearance of defendant. Filed March 25th, 1907, A. L. Richardson, Clerk. Borah, Cavanah & Blake, Solicitors and of Counsel for Defendant.

39 *Decision on Demurrer.*

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

No. 278.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

May, 1907.

Edgar Wilson and R. H. Johnson, for plaintiff.
Charles M. Kahn and J. J. Blake, for defendant.

(On Demurrer.)

DIETRICH, *District Judge:*

The *defendant* is a West Virginia corporation, organized for the purpose of supplying to the defendant, Boise City, a municipal corporation, and to its inhabitants, water for municipal and domestic purposes. It is the owner of a system of water works including pipes, reservoirs and pumping plants, by means of which it is now engaged in supplying water for such purposes.

On the 3rd day of October, 1889, an ordinance was passed by the defendant city, a copy of which is attached to the bill as "Exhibit A," the material part of which is as follows:

"H. B. Eastman and B. M. Eastman and their successors in interest in their water works for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof."

40 On the 10th day of July, 1890, another ordinance was passed by the defendant city, a copy of which is attached to the Bill of Complaint as "Exhibit B," the material part of which is as follows:

"The privilege of laying down and maintaining water pipes in the streets and alleys now laid out, or hereafter to be laid out, and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water & Land Improvement Company, its successors and assigns."

The Artesian Water & Land Improvement Company was a corporation formed under the laws of the State of Idaho for the purpose of supplying Boise City and its inhabitants with water for public and domestic uses.

After the passage of the first ordinance the Eastmans accepted the same and constructed a system of water works, consisting of artesian wells and reservoirs and pipes for the carrying and delivery of water, and, after the passage of the second ordinance, the Artesian

Water & Land Improvement Company accepted the same and proceeded to construct a system of water works similar to that of the Eastmans.

Thereafter, on March 28th, 1891, The Artesian Hot & Cold Water Company, Limited, a corporation organized under the laws of Idaho, for the purpose of supplying Boise City and its inhabitants with water for municipal and domestic uses, became the owner, by transfer, of both of said systems, including the alienable rights of the Eastmans and of the Artesian Water & Land Improvement Company under the said ordinances.

On April 19, 1900, another ordinance was passed by the defendant city, a copy of which is attached to the Bill of Complaint, as "Exhibit C," the material parts of which are as follows:

"That the Artesian Hot & Cold Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and the ordinances of said Boise City, is hereby granted by said Boise City, authority and permission to lay and maintain the pipes of said company in said city and to supply water to said city and the inhabitants in the manner and according to the
41 laws of Idaho. That demand is hereby made by said Boise City of and from said Artesian Hot & Cold Water Company to furnish, free of charge, sufficient water, to the full extent of the means of said Company, for fire purposes and for the sprinkling of the streets in said Boise City.

"That the privilege and authority granted by this ordinance shall continue for the same term provided for in the franchise heretofore granted by said City to the predecessors of said Artesian Hot & Cold Water Company."

It does not appear what persons or corporations are referred to in this ordinance as "the predecessors of the said Artesian Hot & Cold Water Company"; nor does it appear that the ordinance was ever accepted by the Artesian Hot & Cold Water Company or that anything was ever done thereunder by said Company.

On August 28, 1901, the plaintiff became the owner, by purchase, of the entire water works system and plant of the Artesian Hot & Cold Water Company, including all its property, real and personal, and all its rights, privileges and franchises, granted by the ordinances of Boise City above referred to.

It is further alleged in the Bill of Complaint that since the passage of the ordinance referred to the population of Boise City has grown from about three thousand to about twenty thousand, and that the corporate limits have been largely extended, and that the plaintiff has expended large sums of money in improving and enlarging its plant for the purpose of meeting the increased demands for water, and that it has supplied, and is supplying, a large amount of pure, wholesome water to meet the demands of the defendant and its inhabitants, and that it has charged and is charging the rates fixed in the manner provided by the Statutes of Idaho. That the rates so charged will not realize a net return of to exceed six per cent. per annum on the plaintiff's investment.

It is further alleged that while such rates were in effect the de-

fendant on the 7th day of June, 1906, passed an ordinance
42 a copy of which is attached to the Bill as "Exhibit D," which, in substance, required that thereafter the plaintiff pay to the defendant a license of $300.00 per month.

It is further alleged that a commission, created and acting pursuant to Section 2711, Revised Statutes of Idaho, and an act approved March 9, 1905, amendatory thereof, in fixing the rates to be charged by the plaintiff to consumers, (which schedule of rates was adopted on August 1, 1905, for a period of three years next thereafter ensuing) fixed the same upon the assumption that such rates would realize a net income of six per cent. interest to the plaintiff, upon its investment, and that said Commission did not take into consideration or acticipate the license fee exacted by the ordinance last referred to, that is, the ordinance of June 7, 1906.

It is further alleged that the defendant has made demands upon the plaintiff for the license fees provided for in said ordinance, and that upon the failure of the plaintiff to pay the same, the defendant, on the 13th day of December, 1906, commenced an action at law against the plaintiff in the Idaho State courts to collect the same.

It is further alleged that the plaintiff, "And its predecessors in interest have at no time claimed and do not now claim that their franchises for the use of said streets and alleys and the supplying of said water are perpetual or exclusive."

It is further alleged, "That the term for which said last named ordinance (that is the ordinance of April 19, 1900, Exhibit C) was by its terms to continue was to and until the 10th day of July, 1940."

It is further alleged, "That the defendant and its common council have claimed, and still maintain and insist, that your orator's right to use the streets of said Boise City is a license only which is
43 subject to annulment and revocation at the will of the municipal authorities of defendant, and that said authorities have the right to compel your orator to discontinue the use of said streets and alleys or to levy burdens and assessments upon your orator at the pleasure of said authorities for the privilege of using the same."

Plaintiff alleges many other matters in detail and sets forth constitutional provisions which, it claims, are being violated or may be violated by the threatened action of the defendant. But enough of the Bill is disclosed by the foregoing statement for a clear understanding of the principal question submitted upon the argument, and that is, whether the plaintiff has, by virtue of the several ordinances referred to, a franchise for a definite period or a mere license.

At the argument it was conceded, upon the one hand by counsel for the plaintiff, that if the ordinances referred to are to be construed as conferring upon the plaintiff a license only, the defendant may either revoke the license absolutely or impose, as conditions of the further continuance of the license, additional burdens, among which may be a license fees as provided in the ordinance of June 7, 1906; and, upon the other hand by counsel for the defendant, that is the ordinances referred to grant a franchise for a fixed period, it is incompetent for the defendant to exact the fee provided for in the

ordinance of June 7, 1906. In other words, the validity of the ordinance of June 7, 1906, is the controlling issue raised by the demurrer, and the validity of this ordinance depends upon the answer to the question, whether the prior ordinances granted a franchise for a fixed period or conferred only a license, revocable at the will of the defendant. Several collateral questions were discussed but they may all be disposed of by the answer to this one question.

44 In a former action (at law) between the same parties, commenced in this court and, upon writ of error, reviewed by the Circuit Court of Appeals for the Ninth Circuit (123 Fed. 232) the appellate court, in construing the first ordinance heretofore referred to, that is, the one to the Eastmans, dated October 3, 1889, used the following language:

"From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right and that the ordinance operated to grant them a license only and left the city free at any time to revoke the privilege granted or to put in its own water works or to grant a franchise to another company. The most that the license-s could claim under it was that it legalized their use of the streets for supplying water and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

It is now contended by counsel for the plaintiff that this language is *dictum* and that such a construction of the ordinance was not necessary to the decision in that case, and that, therefore, it need not be accepted by this court as an authoritive judicial interpretation. But, upon a careful examination of the entire opinion of the court in that case, I cannot accept this view. It is possible that the court might have reached the conclusion which it did reach without so construing the ordinance, but the construction seems to have been advisedly adopted, and with it the general discussion and conclusion of the Court are logically and substantially connected. Moreover, the plaintiff, notwithstanding its criticism of this decision, has in its Bill taken a position which makes any other conclusion inevitable.

The Court said:

"No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. *It is plain that the ordinance was either the grant of a license, revocable at the will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions.*"

And counsel do not now contend that, so far as that ordi-

45 nance is concerned there is a middle ground. The only cases cited which seem to be out of harmony with the view adopted by the court that the ordinance granted only a license, are *City of New Orleans vs. Telephone and Telegraph Co.*, 3 *So.* 533; *Hudson Telephone Company vs. Jersey City*, 49 *N. J. L.* 305, 60 *Am. Rep.* 621; 8 *Atl.* 124; *and State Ex Rel. St. Louis*, 145 *Mo.*, 591; 46 *S. W.* 993. These cases, however, so far as they are in point, tend to support the assertion of a "perpetual and irrevocable" franchise, and not a franchise for a fixed or determined period. But the plaintiff

not only at the argument disclaimed any such interpretation, but in its Bill it expressly repudiates this construction, and states that neither it nor its predecessors ever claimed the franchise to be "perpetual or exclusive." The conclusion of the appellate court would therefore seem to be not only reasonable, but inevitable.

But plaintiff now relies also on the two other ordinances attached to the bill. The ordinance in favor of the Artesian Water & Land Improvement Company, dated July 10, 1890, (Exhibit B), was not before the appellate court in the former case, and in view of the question there in controversy it is not strange that the plaintiff did not then rely upon it; for, as I understand, one of the principal contentions made in that case upon behalf of the plaintiff was that it was exempt from the obligation imposed by statute upon water corporations to furnish water free of charge for certain municipal purposes because its franchise was granted to natural persons and not to a corporation, and that, therefore, the statutory provision was not applicable.

It is not clear from the opinion of the Court in the former case whether or not the ordinance of April 19, 1900, (Exhibit C) was under consideration. In the opinion, an ordinance, (passed in March, 1900), which seems to correspond to this ordinance, Exhibit C, is referred to, but plaintiff then contended that it had never accepted that ordinance and claimed no rights thereunder, and
46 recognized no obligations by reason thereof. In the absence of an allegation that this ordinance, Exhibit C, was accepted, perhaps it should be presumed that it never was accepted by the plaintiff or its predecessors; but if we should assume it was accepted, plaintiff's position would not be materially fortified.

The plaintiff contends that while the ordinance of July 10, 1890, (Exhibit B) is not in substance distinguishable from the Eastman ordinance of October 3, 1889, so far as the express language is concerned, still inasmuch as Exhibit B runs to a corporation, the Court in construing it should read into it a clause providing that the privilege granted shall continue for fifty years because of Section 2710, Revised Statutes of Idaho, which is as follows:

"No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

In other words, in the absence of language in the ordinance defining the term, this statute operates to extend the grant for the maximum period which could have been legally specified.

Possibly influenced in a measure by the representations made in the Bill that the defendant is disposed to deal unjustly with the plaintiff, and the earnest appeal of counsel for protection against impending confiscation of the plaintiff's property, I have given sympathetic consideration to this contention, hoping that thereby, with-

out destroying the integrity of the law, the relations between the parties might be so defined that neither would be able to do grave injustice to the other, but I have been unable to accept the construction as either a natural or a probable one. The statutory provision relied upon does not purport to define or prescribe what the
47 contract or grant shall contain, but what it shall not contain. It is a limitation upon the power to contract, not a provision of the contract. It is not mandatory, but prohibitive. If it provided that in the absence of express agreements the term should be fifty years, then it would naturally take its place in every contract or grant silent as to the term. Suppose that the language were, "No contract or grant must be made for a term less than five years or more than fifty years," what would be the term of a grant like that under consideration? Would there be any more reason to presume the maximum than the minimum? Upon the other hand, by the familiar rule that public grants susceptible of two constructions must receive the one most favorable to the public, would we not be compelled to adopt the minimum? No substantial distinction can be made between the hypothetical statute and the provision under consideration; in both cases the maximum is fifty years; in the one the minimum is a grant for five years, in the other a grant revocable at will.

Nor, if we should invoke for the benefit of plaintiff the most liberal rules by which transactions between private persons are adjudged, are there any facts or circumstances disclosed by the Bill from which the inference can be drawn that at the time the ordinance was passed, or at any time, it was understood or assumed that the franchise would run for fifty years. At the time this ordinance was enacted the Eastman ordinance was in effect. As we have seen, this was granted to and held by natural persons, and there is no reason to suppose that it was thought that the statutory provision limiting the term of a franchise granted to a corporation to a maximum term of fifty years, had any application to the Eastman franchise. The Eastman franchise, therefore, appeared to be and was without any fixed period, and it is only natural to assume that when the Artesian Water and Land Improvement Company applied for a franchise it expected to receive and the City Council intended
48 to grant to it privileges similar to those enjoyed by its competitors, the Eastmans. The two grants were intended to be substantially the same.

And this view is strongly corroborated by the later ordinance, Exhibit C, in favor of the Artesian Hot and Cold Water Company, which company had, prior thereto, upon March 28, 1891, taken over by transfer all rights under both Exhibits A and B. In Exhibit C, it is specified:

"That the privilege and authority granted by this ordinance shall continue for the *same term* provided for in the *franchise* granted by said city to the *predecessors* of the said Artesian Hot and Cold Water Company."

It thus appears that while the Artesian Hot & Cold Water Company held both grants (for it had "predecessors") the privilege or

"franchise" granted was regarded as a *single* one, and there was but *one* "term."

It has also been suggested that the city authorities intended a perpetual grant, and that while such grant should be held void so far as it relates to a period subsequent to the expiration of fifty years, it should be held void for the maximum statutory term.

In Blaschko *vs.* Wurster, Mayor, *et al.*, (N. Y.), 51 N. E., 303, the court had under consideration the question, whether a general consent that the defendant railroad might operate its road in certain streets named in the ordinance or resolution, without any limitation as to time, was good for twenty-five years, the maximum period provided by law for such a grant, and the court says:

"The railroad made no application for such grant. We cannot say now that the aldermen would have adopted any resolution granting any such right, or that the railroad would have accepted it. What the railroad asked and what the aldermen voted was the right in perpetuity. All parties evidently acted upon the assumption that the restrictions of the new charter were in abeyance till the new government went into operation, and to give now a construction to their acts contrary to their intention and solely on the principle that the greater must include the less, would be straining for reasons to reverse or modify."

49 Both in the Bill and in the argument much stress is laid upon the fact, as claimed, that is it be held that the plaintiff has only a license revocable at the will of the defendant the plaintiff would suffer great loss, and that it is in danger of having its property entirely confiscated. Indeed it is to be doubted whether the plaintiff would seriously make some of the contentions which have been made were it not for the unfortunate predicament in which it is placed in its controversy with the defendant by the decision of the Circuit Court of Appeals in the former case. It was stated at the argument that considerable bitterness had been generated by reason of the long standing controversy between the parties, and it is to be inferred that the license charge objected to was made in a spirit of retaliation. It was also stated at the argument that while the plaintiff is a foreign corporation its stockholders are, in the main, citizens of Boise City, and it does not seem probable that public sentiment in Boise City would, for any considerable period of time, demand that the plaintiff be unfairly dealt with, or at any time consent to a confiscation of the plaintiff's property, and it is not to be presumed that in such matters the city authorities would or will, for any great length of time, act out of harmony with public sentiment.

But however that may be, and however imminent the danger to plaintiff's property may be, the court cannot create rights, but can only protect rights already existing. The courts may prohibit the impairment of contracts, but there must be contracts to protect before the assistance of the courts can be successfully invoked. The mere fact that the plaintiff may possibly suffer loss or that the authorities of the defendant city may not, in their dealings with the plaintiff, by governed by the Golden Rule, is not, in itself, sufficient

to invest this court with jurisdiction to interfere. To start
50 with the defendant had absolute and exclusive dominion over its streets and alleys, and it still has such absolute dominion except so far as it has surrendered the use and occupation of the same by some valid grant or contract, and the fundamental question is, what was the extent of the grant to, or what was the nature of the contract with, the plaintiff's predecessors in interest? In construing this grant or contract in accordance with rules applicable to the interpretation of contracts between private individuals we have not been able to conclude that the plaintiff has a franchise for a fixed period, but these rules are much more favorable to the plaintiff than we are permitted to apply to transactions between municipal corporations and private individuals in matters of this character.

"The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication. This principal, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.'" Slidell *vs.* Grandjean, 111 U. S. 412, 438; 28 L. Ed. 321, 330; 4 Sup. Ct. Rep. 475."

Coosaw Mining Company *vs.* South Carolina, 144 U. S. 550, 562; L. Ed. 537, 542.

This language is quoted with express approval in the recent case, Knoxville Water Company *vs.* Knoxville, 200 U. S. 22; 50 L. Ed. 353, where the court also says:

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation when exerting its functions for the general good is not to be shorn of its powers by mere implication. If by contracts or otherwise which may in particular circumstances restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

It is argued that by reason of the possible loss or even confiscation of the defendant's property under the construction given
51 to these ordinances it is wholly improbable that the plaintiff's predecessors in interest would have asked for or accepted such grants, and therefore it is to be presumed that such a construction was not contemplated. But such presumption does not necessarily arise. Even if we adopt the construction now contended for by the plaintiff, its predecessors confessedly accepted*ly* the grant, entered upon the defendant's streets and alleys, and invested their money, assuming risks and perils scarcely less probable than those now complained of. It is conceded that at the end of fifty years the plaintiff's

franchise would lapse, and that it would, from that time on, occupy the defendant's streets at the defendant's pleasure. In other words, it would be in the same condition at that time, under its construction of the ordinance, as it now is under the defendant's construction. Moreover, it admits that it has not and never had an exclusive franchise, and were the city bent upon confiscating the plaintiff's property it could either by granting a franchise to another company, or more obviously by constructing its own plant, enter into a competition with the plaintiff which would be more disastrous to the plaintiff than the license fee complained of.

In the case of Knoxville Water Company *vs.* Knoxville, cited *supra,* the plaintiff water company sought to enjoin the city authorities from putting in city water works to compete with the plaintiff, it being claimed by the plaintiff that it had an exclusive franchise, and it contended no less strenuously than the plaintiff is contending here that the threatened action of the city meant the confiscation of its property, and it was there argued as it is here argued that the parties, in making and accepting the grant, could not have contemplated such possible injury to or confiscation of the property of the water company. In speaking of this contention the court says:

52 "It is said that the company could not possible have believed that the city would establish water works to be operated in competition with its system, for such competition would be ruinous to the water company, as its projectors, on a moment's reflection, would have perceived when the agreement of 1882 was made. On the other hand the city may, with much reason, say that, having once thought of having its own water works the failure to insert in that agreement a provision precluding it, in all circumstances and during a long period, from having its own separate system, shows that it was not its purpose to so restrict the exercise of its powers, but to remain absolutely free to act as changed circumstances or the public exigencies might demand. The stipulation in the agreement that the city would not, at any time, during the thirty years commencing August 1, 1883, grant to any person or corporation the same privileges it had given to the water company was by no means an agreement that it would never, during that period, construct and maintain water works of its own * * *. If this interpretation of the contract will bring hardship and loss to the water company and to those having an interest in its property and bonds, the result (omitting now any consideration of the question of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do."

If at the time the defendant and the predecessors in interest of the plaintiff, contemplated a fifty year term for the franchise, it was such a simple thing, such an obvious thing, to insert in the ordinance itself a *cal*use to that effect, that the absence of such a clause makes it almost incredible that such term was agreed upon or contemplated. On the other hand it is not unreasonable to suppose that the donees,

being citizens of the defendant city, and in all probability being friends and acquaintances of the city authorities, and not fully realizing or anticipating the larger growth of the city, gave little thought to the distant future, and sought only permission to lay their pipes in the streets of the city, feeling secure against competition, and confiding in the fair dealing of their fellow townsmen.

But however that may be, again to quote from the opinion in Knoxville Water Company *vs.* Knoxville, cited *supra:*

"It is we think important that the court should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations, and the doctrines of the adjudged cases that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body charged with public duties be held upon mere implication or presumption to have devested itself of its powers."

53 It was said by the same court, in Hamilton Gas Light & Coke Company *vs.* Hamilton, 146 U. S. 258, 268; 36 L. Ed. 963, 968:

"It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As said by this court in Curtis *vs.* Whitney, 80 U. S. 13 Wall. 68, 70 (20: 513, 514): 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit languages as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

Again the same court, in Fertilizing Company *vs.* Hyde Park, 97 U. S. 66; 24 L. Ed., 1036, says:

"Every reasonable doubt is to be resolved adversely to the corporation. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

It is a matter of common knowledge that as a general rule corporations and others to whom public franchises are granted first seek such franchises. Naturally and not improperly they endeavor to procure grants as liberal as possible, and they themselves prepare or cause to be prepared by their own counsel the ordinances or resolutions or contracts by which the grants are to be effectual. Presum-

ably in the instruments thus prepared under their direction, their rights will be clearly defined and properly guarded. It is, of course, not unlikely that sometimes this *in* not done, but that does not change the rule; nor does it detract from the reasons underlying the doctrine that where the extent of the grant is in doubt the doubt should be resolved in favor of the public.

54 For these reasons the demurrer must be sustained, and the Clerk is directed to enter an order accordingly, and thereupon enter judgment dismissing the Bill.

DIETRICH,
District Judge.

Endorsed: No. 278. In the Circuit Court of the United States for the District of Idaho. The Boise Artesian Hot & Cold Water Co., a corporation, *vs.* Boise City, a Municipal corporation, Decision on demurrer. Filed June 1, 1907, A. L. Richardson, Clerk.

55 *Order.*

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Moscow, Idaho, on Saturday the first day of June, 1907.

Present: Hon. Frank S. Dietrich, Judge.

Central Division.

No. 278.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

On this day the Court announced its decision upon the demurrer to the complaint herein, heretofore argued and submitted, which decision is in writing and on file in said cause, and is to the effect that said demurrer be sustained; thereupon it is ordered that said demurrer be and the same is hereby sustained; and it is further ordered that judgment be entered dismissing the bill of complaint in said cause.

56 *Judgment.*

In the Circuit Court of the United States in and for the Central Division of the District of Idaho, Ninth Circuit.

BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Order Sustaining Demurrer and Judgment for Defendant.

This cause being heard on the 3rd day of May, 1907, upon demurrer of the defendant to the petition of plaintiff, and having been

argued by counsel for the respective parties, and the Court being fully advised in the premises is of the opinion and it is therefore ordered that said demurrer be and the same is hereby sustained, to which ruling of the court plaintiff by its counsel excepts and thereupon the plaintiff not asking to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein sustained.

Dated the 10th day of June, 1907.

FRANK S. DIETRICH, *Judge.*

Costs $43.00.

Endorsed: No. 278. U. S. Circuit Court, Central Division, District of Idaho. Boise Artesian Hot & Cold Water Co., Ltd., *vs.* Boise City a Municipal corporation. Decree. Filed June 10, 1907, A. L. Richardson, Clerk.

57 *Petition for Appeal.*

In the Circuit Court of the United States for the District of Idaho, Central Division.

THE *Coirt* ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

BOISE CITY, a Municipal Corporation, Defendant.

Petition for Appeal.

The above-named plaintiff conceiving itself aggrieved by the final decree made and entered on the 10th day of June, 1907, in the above-entitled cause does hereby appeal from said decree to the Supreme Court of the United States, and it prays that this appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States. And your petitioner will ever pray.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED,
Appellant,

By EDGAR WILSON AND
RICHARD H. JOHNSON,
Solicitors for Plaintiff and Appellant,
112 *North Sixth Street, Boise, Idaho.*

RICHARD Z. JOHNSON,
Of Counsel for Plaintiff and Appellant.

Endorsed: No. 278. In the Circuit Court of the United States for the District of Idaho, Central Division. The Boise Artesian Hot & Cold Water Company, Limited, a corporation, Plaintiff, *vs.* Boise City, a municipal corporation, Defendant. Petition for appeal. Filed June 24th, 1907. A. L. Richardson, Clerk. Edgar Wilson & Richard H. Johnson, Solicitors for Plaintiff. R. Z. Johnson, of Counsel.

58 *Assignment of Errors.*

In the Circuit Court of the United States for the District of Idaho, Central Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Assignment of Errors.

The plaintiff files the following assignment of errors in the record and proceedings in the above-entitled suit:

The Circuit Court of the United States for the District of Idaho, erred in holding and deciding that the ordinances of said defendant, Boise City, passed June 7th, 1906, and December 6th, 1906, and the subsequent proceedings taken by said city thereunder, were valid. The validity of said ordinances and proceedings was denied and drawn in question by the plaintiff on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth, as follows:

The Circuit Court of the United States for the District of Idaho erred:

First. In holding and deciding that said ordinances and proceedings thereunder did not impair the obligation of contracts, theretofore entered into and existing between plaintiff and defendant, contrary to the provisions of Article I, Section 10 of the Federal Constitution, and in not holding the same invalid.

59 Second. In not holding and decreeing that the said ordinances deny to plaintiff the equal protection of the laws, contrary to the provisions of the fourteenth amendment of the Federal Constitution, and are therefore invalid.

Third. In not holding and decreeing that the said ordinances and the enforcing thereof by defendant will deprive plaintiff of its property without due process of law, contrary to the provisions of said fourteenth amendment, and that said ordinances are therefore invalid.

Fourth. In holding and deciding that the plaintiff's right to use the defendant's streets and alleys is a license only, which is subject to forfeiture and annullment at the will of defendant and that said defendant may at any time, in its discretion, compel plaintiff to discontinue the use of its streets and alleys or levy such burdens and assessments for such use as it may see fit.

Fifth. In not holding and decreeing that plaintiff was entitled to an injunction restraining defendant from enforcing the said ordinances or from interfering with plaintiff in the use according to its franchises of the defendant's streets and alleys.

Sixth. In not holding and decreeing that the rates mentioned in plaintiff's Bill of Complaint, fixed by the water commission, to be

charged by plaintiff for water used by the defendant, are legal and valid.

Seventh. In failing to render a decree in favor of plaintiff against defendant for the amount due and owing for water for fire purposes in accordance with said rates.

Eighth. In failing to adjudge and decree that the said ordinance of June 7th, 1906, amounts to deplicate taxation of plaintiff's property and is unreasonable, discriminatory and oppressive and beyond the legislative power of defendant's city council, and therefore invalid.

60 Wherefore the plaintiff prays that the said decree be reversed and that said court be directed to enter a decree in favor of plaintiff in accordance with the prayer of the Bill, and for costs.

EDGAR WILSON,
RICHARD H. JOHNSON,
Solicitors for Plaintiff.

RICHARD Z. JOHNSON,
Of Counsel.

Endorsed: No. 278. In the Circuit Court of the United States, for the District of Idaho, Central Division. The Boise Artesian Hot and Cold Water Company, Limited, a corporation, Plaintiff, *vs.* Boise City, a municipal corporation, Defendant. Assignment of Errors. Filed June 24, 1907, A. L. Richardson, Clerk.

61 *Order Allowing Appeal.*

In the Circuit Court of the United States for the District of Idaho, Central Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Order Allowing Appeal.

Upon Motion of Counsel for plaintiff, and on filing the petition of plaintiff for an order allowing appeal, together with an assignment of errors, it is ordered that an appeal be, and hereby is allowed to said plaintiff to the Supreme Court of the United States from the decree entered on the 10th day of June, 1907, and that the amount of plaintiff's bond upon said appeal be and is hereby fixed at the sum of One Thousand Dollars, such bond when approved to act as a supersedeas, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the Supreme Court of the United States.

Dated June 24th, 1907.

FRANK S. DIETRICH,
District Judge.

Endorsed: No. 278. In the Circuit Court of the United States, for the District of Idaho, Central Division. The Boise Artesian Hot and Cold Water Company, Limited, a corporation, *vs.* Boise City a municipal corporation, defendant. Order allowing appeal. Dated June 24th, 1907. Filed June 24th, 1907, A. L. Richardson, Clerk.

62 *Supersedeas Bond.*

In the Circuit Court of the United States for the District of Idaho, Central Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Supersedeas Bond.

Know all men by these presents, that we, the Boise Artesian Hot & Cold Water Company, Limited, as principal, and Frank R. Coffin and Timothy Regan, as sureties, are held and firmly bound unto Boise City, Idaho, in the sum of One Thousand ($1,000.00) dollars, to be paid to the said city to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 19th day of June, 1907.

Whereas, the above-named plaintiff hath prosecuted an appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled suit by the Circuit Court of the United States for the District of Idaho; now, therefore, the condition of this obligation is such that is the above named plaintiff, the Boise Artesian Hot & Cold Water Company, Limited, shall prosecute its said appeal to effect, and answer all costs and damages that may be adjudged if it shall fail to make its plea good, then this obligation to be void, otherwise to remain in full force.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED,
By H. B. EASTMAN, *Its General Manager.*

Attest:
B. S. HOWE,
[SEAL.] *Secretary.*

63 F. R. COFFIN. [SEAL.]
TIMOTHY REAGAN. [SEAL.]

STATE OF IDAHO, *County of Ada, ss:*

Frank R. Coffin and Timothy Regan being first duly sworn each for himself, deposes and says that he is a resident and householder in said county of Ada and is worth the sum of One Thousand Dollars, exclusive of property exempt from execution over and above all his just debts and liabilities.

F. R. COFFIN.
TIMOTHY REGAN.

Subscribed and sworn to before me this 24th day of June, 1907.
[SEAL.] LOUIS N. ROOS,
Notary Public.

The sufficiency of the sureties to the foregoing bond hereby approved this 24th day of June, 1907, and the bond is to operate as a supersedeas.

FRANK S. DIETRICH,
District Judge.

Endorsed: No. 278. In the Circuit Court of the United States for the District of Idaho, Central Division. The Boise Artesian Hot & Cold Water Company, Limited, a corporation, Plaintiff, *vs.* Boise City, a Municipal corporation, Defendant. Supersedeas Bond. Filed June 24th, 1907, A. L. Richardson, Clerk.

64 In the Circuit Court of the United States for the District of Idaho, Central Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Boise City, Idaho, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C. within sixty days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, wherein the Boise Artesian Hot & Cold Water Company, Limited, is appellant and you are appellee, to show cause if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 24th day of June, in the year of our Lord One thousand nine hundred and seven.

[Seal United States Circuit Court, Idaho.]

FRANK S. DIETRICH,
District Judge.

Attest:
A. L. RICHARDSON,
Clerk of said Court.

65 The undersigned Solicitors of record for the defendant and appellee, hereby acknowledge due service of the above citation, this 25th day of June, 1907.

CHAS. M. KAHN,
BORAH, CAVANAH & BLAKE,
Solicitors for Boise City, Idaho, Defendant and Appellee.

66 [Endorsed:]No. 278. Original. In the Circuit Court of the United States for the District of Idaho, Central Division. The Boise Artesian Hot & Cold Water Company, Limited, a corporation, Plaintiff, *vs.* Boise City, a municipal corporation, Defendant. Citation. Filed on return June 25, 1907. A. L. Richardson, Clerk.

67 *Clerk's Certificate.*

In the Circuit Court of the United States for the District of Idaho, Central Division.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Plaintiff,
vs.
BOISE CITY, a Municipal Corporation, Defendant.

Clerk's Certificate.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 67 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause and that the same together constitute the transcript of the record herein upon appeal to the Supreme Court of the United States.

I further certify that the cost of the record herein amounts to the sum of $46.20, and that the same has been paid by the appellant.

Witness my hand and the seal of said court affixed at Boise, Idaho, this 26th day of June, 1907.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON, *Clerk.*

Endorsed on cover: File No. 20,794. Idaho C. C. U. S. Term No. 391. Boise Artesian Hot and Cold Water Company, Limited, appellant, *vs.* Boise City. Filed July 13th, 1907. File No. 20,794.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

No. 391

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Appellant

vs.

BOISE CITY.

BRIEF AND ARGUMENT OF APPELLANT

Appeal from the Circuit Court of United States for the District of Idaho

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States for the District of Idaho, sustaining a demurrer to plaintiff's bill and dismissing the same.

The suit was commenced by appellant, water company, to enjoin Boise City from the enforcement of certain ordinances and to have the same annulled, on the ground that they impair the obligation of contracts, and are also in violation of certain provisions of the fourteenth amendment to the federal Constitution.

The court below held in substance that no contract relations existed and that the authority under which the water

company uses the streets of Boise, is merely a license, revocable at the pleasure of the city, and not a contract, and that therefore the city may impose upon the water company any burdens it chooses for the privilege of using the streets and supplying its customers with water or prohibit such use entirely.

The provisions of the Constitution of Idaho which went into effect July 3rd, 1890, and the Revised Statutes of 1887, and municipal ordinances of Boise City, which may affect the questions involved, are as follows:

Right to Collect Rates a Franchise.

> "The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise and can not be exercised except by authority of and in the manner prescribed by law." Const., Art. XV, Sec. 2.

Rates to Be Established by Law.

> "The Legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose." Ibid., Sec. 6.

Chapter V of title LV, of the Civil Code, Rev. Stat. 1887, entitled "Water and Canal Corporations," provides:

> "Sec. 2710. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."
>
> "Sec. 2711. All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses, so

long as the supply permits, at reasonable rates and without distinction of person, upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by commissioners to be selected as follows:

"Two by the city or town authorities, or when there are no city or town authorities, by the Board of Commissioners of the County, and two by the water company; and in case a majority cannot agree to the valuation, the four commissioners must choose a fifth commissioner; if they cannot agree upon a fifth, then the probate judge of the county must appoint such fifth person. The decision of the majority of the commissioners must determine the rates to be charged for water for one year, and until new rates are established. The Board of County Commissioners or the proper city or town authorities may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."

This section was amended by Act of March 9th, 1905, and the part relating to furnishing water free of charge was stricken out, and the section, as amended, is set forth in full on page 11 of transcript.

This section was also amended by the Act of March 16th, 1907, 9 Ses. 556, to apply to "all *persons, companies,* or corporations supplying water to towns and cities."

"Sec. 2712. Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable direction of the Board of County Commissioners, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways and alleys in any town or city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city or through c. to any part thereof."

This section as amended by the Act of March 9th, 1905, is set forth in full on page 11 of transcript.

Franchises May Be Sold Like Other Property.

> "For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property." Rev. Stat., Sec. 2642.

The charter of Boise City, approved January 11, 1866, provides as follows:

> "Sec. 3. For the government of said city there shall be elected biennially a Mayor, a Common Council consisting of five members, a Collector, a Treasurer and a Justice of the Peace for said City * * *." (Special and Local Laws, 1887, Section 130.)

This was amended by Act of March 14th, 1901, as follows:

> "The power and authority given to the municipal corporation of Boise City by this Act, is vested in the Mayor and Common Council, and in the Departments authorized by their act, and by their successors in office, to be exercised in the manner hereinafter prescribed." (Rev. Ord. Boise City, page 4, Sec. 5.)

Sec. 5, Sub. 9, is as follows:

> "The Mayor and Common Council shall have full power and authority within Boise City * * * * to provide the city with good and wholesome water; and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor * * * *."

Sec. 10 provides:

> "The roads, streets and alleys within said city limits shall be under the exclusive control of said Common Council, who shall make all needful rules in relation to the improvements, repair, grading, cleaning, etc., of the same, and said city shall not be included in any road district in said county * * *."

Sec. 40 provides:

> "This Act shall be deemed a public Act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all Courts and places."

Rights owned by appellant, under ordinances granted to its various assignors and predecessors in interest, are as follows:

> "An Ordinance Granting Eastman Brothers the Right to Lay Water Pipes in Boise City.
>
> "The Mayor and Common Council of Boise City, ordain:
>
> Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their water works, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.
>
> Sec. 2. This ordinance shall take effect from and after its passage and approval.
>
> Approved October 3, 1889." (Transcript, "Ex. A," page 10.)

> "An Ordinance Granting to the Artesian Water and Land Improvement Company the Right to Lay Water Pipes in Boise City.
>
> "The Mayor and Common Council of Boise City, Idaho, do ordain:
>
> Section 1. The privilege of laying down and maintaining water pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.
>
> Section 2. All water pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenience speed.
>
> Section 3. This Ordinance shal take effect and be in force from and after its passage.
>
> Approved July 10, 1890." (Transcript "Ex. B," page 10.)

The allegations of the bill of complaint, which are to be taken as true for the purposes of the demurrer, show that these ordinances were duly accepted by the grantees named therein and that they proceeded under each of said grants, to construct separate water works systems, consisting of artesian wells and reservoirs, and laid mains and pipes under and along the streets of Boise City and supplied water to the city and its inhabitants.

That appellant acquired all rights under said ordinances and all the properties and water works constructed thereunder, in the month of August, 1901, and has ever since owned the same.

That up to the time these properties were purchased by appellant, there had been expended on the water systems by appellant's grantors more than two hundred thousand dollars, and since that time, in order to meet the increased demand occasioned by the growth of the city from a population of about six thousand to over twenty-one thousand, the appellant has extended its system to supply new subdivisions of territory taken into the city, and increased its water supply by constructing new wells, reservoirs and pumping stations, and had expended on such improvements, up to the time of the filing of the bill, an additional sum of more than one hundred thousand dollars.

That appellant and its grantors always supplied pure, fresh and healthful water and have complied with each and every condition named in said ordinances.

That the use by appellant and its grantors of the streets and alleys during the seventeen years preceding the filing of the bill has been at all times legal and under the authority of the ordinances above set forth, and the supplying of such water to the city and its inhabitants is an important public service of great benefit to the city and its inhabitants, and was the consideration for which the city granted the rights contained in said ordinances to appellant and its grantors,

and that it was upon the faith of those ordinances and franchises that appellant and its grantors made the expenditures for those water works.

That the rates for water charged by appellant are those fixed by a commission appointed in accordance with Section 2711, Revised Statutes of Idaho, quoted above, of which two commissioners were appointed by the city and two by the water company, and after an extended session and careful investigation the commission fixed such rates to be charged by appellant as would yield to appellant a net return of 6 per cent. per annum upon the then valuation of appellant's property and plant; and that the rates so fixed have not, and will not, yield appellant any larger net return. That the schedule of rates adopted by the commission has been in force ever since August, 1905, and was accepted by the water company and the city, and the company has regulated its charges for water in accordance with the rates so established.

That on May 31st, 1906, the Common Council of Boise City passed the ordinance in controversy in this suit, and which is found in full upon page 13 of Transcript and is marked "Ex. D."

That the city and its Common Council claimed the right to pass this ordinance upon the ground that appellant's rights, under the ordinances before set forth, to use the streets and alleys of the city, were licenses only, which are subject to annulment or revocation at the pleasure of the city, and that the city authorities have the right, at any time, to compel appellant to discontinue the use of the streets and alleys for its pipes and mains, or to levy burdens and assessments upon appellant, at the pleasure of the City Council, for the privileges of such use, and that the city intends to impose further burdens and assessments on appellant for such use and to interfere with its use of the streets and alleys, for such purposes, and that the city has also threatened to

remove appellant's pipes from the streets and alleys and its water works from the city.

That the city has presented bills every month to appellant for the amount of the so-called license tax, and threatened appellant with suits for the collection thereof, and on December 6th, 1906, the Common Council of Boise City passed the ordinance marked "Exhibit E", found upon page 14 of Transcript.

That on December 13, 1906, in accordance with this ordinance, Boise City commenced an action in the District Court of Ada County, Idaho, against the water company to collect seventeen hundred and fifty dollars, the amount of the tax alleged to be due up to December 1, 1906. This action has been continued by order of that Court, made in pursuance of stipulation of counsel, to await the final disposition of this suit.

That on December 31st, 1906, Boise City, through its City Clerk, made a further written demand upon appellant for three hundred dollars for the tax alleged to be due for the month of December, 1906, and appellant alleged in its bill, upon information and belief, that the city would continue to present bills and demand payment of the tax from month to month and would commence actions from time to time to collect the same, and that a multiplicity of suits would thereby result unless appellant was afforded the relief prayed for.

The bill further sets forth the injury and damage which the passage of ordinances, Exhibits "D" and "E", has caused appellant, in that they have cast clouds upon its franchises and rights to use the streets and alleys of the city and its right to supply the city and its inhabitants with water, and that the ordinances in question tend to greatly depreciate the value of appellant's property, impair its credit, embarrass its business and reduce its net revenue to an extent which will amount to confiscation of its property, and that

the enforcement of those ordinances, as threatened and intended by the city, will impair and destroy appellant's franchises and contract rights. That said ordinances, Exhibits "D" and "E", are in contravention of Article I, Section 10, of the Federal Constitution, forbidding legislation impairing the obligations of contracts, and that their enforcement would deprive appellant of its property without due process of law, and deny it the equal protection of the laws, in violation of the Fourteenth Amendment.

The appellant also showed that the city was indebted to it for water supplied for fire purposes from the first day of May, 1906, until the filing of the bill, in the sum of $2,000, based upon the rates fixed by the water commission, in its report, which is set out in the record. (Trans. p. 14 Ex. F.)

That the city disclaims any liability to pay the water company the rates fixed by the commission or any sum whatever for water for fire purposes and since the first day of May, 1906, has refused to do so and that the city authorities allege and pretend that all of that part of the report of said water commission fixing rates for fire purposes is void and of no force and effect.

Appellant prayed for a decree that the ordinances of October 3, 1889, and July 10, 1890, under which it is using the streets and alleys of the city and supplying water to the city and its inhabitants, be declared valid and subsisting contracts, binding upon the city as well as upon the water company and that the city ordinance, Exhibit "D," and all subsequent proceedings taken thereunder by the city, be declared illegal and void, and that the city be restrained from enforcing that ordinance or interfering with appellant in the legal use of the streets and alleys, according to its franchises.

Appellant also prayed that the rates fixed by the water commission for water supplied to the city for fire purposes, be declared legal and valid and for judgment against the

city for the $2,000 due on that account, and for costs and general relief.

To this bill of complaint, a demurrer (Transcript pp. 19-22) was interposed, denying the equity of the bill generally, and setting forth that the bill fails to show that the plaintiff was authorized by ordinance or by contract to supply water to the inhabitants of Boise City, or to the defendant, or to do business as a water company, within the limits of Boise City. Paragraph five of the demurrer, (Transcript p. 20) raises the question that no time was fixed in the franchise ordinance for the duration of the privilege therein referred to. This demurrer was sustained on this ground and the bill dismissed. It is from this decree dismissing the bill that this appeal was taken.

The sole question considered and decided by the Court below was that the franchise ordinances of October 3, 1889, and July 10, 1890, under which appellant occupies the streets and alleys of Boise City, are mere licenses revocable at the will of the city, because the time for which these grants were to extend, is not mentioned therein; and there are no contract rights between the water company and the city, and that consequently the license ordinance under which the city attempts to collect a fee of $300 per month for the use of the streets is valid.

Judge Deitrich, in his opinion (Trans., pp. 26-27), treated the question just referred to as the vital issue raised by the proceeding in the Court below, and we assume it will be so treated by this Court.

SPECIFICATION OF ERRORS.

Appellant specifies the following errors upon which it will rely on this appeal, based upon the Assignment of Errors heretofore filed (Trans., p. 36, ff. 58-61).

I.

The Court should have held and decreed that the ordinances of October 3, 1889, and July 10, 1890, (Exhibits A and B) after being accepted and acted upon by plaintiff and its grantors, became contracts, the obligations of which were impaired by the ordinances of June 7 and December 6, 1906, (Exhibits D and E), and that the last named ordinances were therefore in contravention of Article I, Section 10, of the Federal Constitution, and void.

II.

The Court should have held and decreed that the ordinances (Exhibits D and E) will deprive plaintiff of its property without due process of law, and deny to plaintiff the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Federal Constitution, and also impair the obligation of the contract between plaintiff and defendant, created by the Commission fixing the rates to be charged for water.

III.

The Court should have issued an injunction restraining defendant from enforcing the ordinances (Exhibits D and E) and from interfering with plaintiff's use, according to its franchises, of the defendant's streets and alleys.

IV.

The Court should have rendered a decree in favor of plaintiff against defendant for the sum of two thousand dollars, due for water for fire purposes.

ARGUMENT.

I.

The Ordinances of June 7, and December 6, 1906, Exhibits D and E, impair the obligation of the contracts created by the grants of October 3, 1889, and July 10, 1890, (Exhibits A and B), and are invalid.

In the discussion of this point, which is the principal one in the case, and the only one considered by the Court below, the appellant will contend:

1. That the franchises granted to appellant's predecessors to use the streets of Boise City, became, when accepted and acted upon, contracts and not revocable licenses, and that that part of the decision of the United States Circuit Court of Appeals, for the Ninth Circuit, in the action between the same parties, quoted and relied upon by the Court below, is dictum and does not correctly state the law applicable to the case at bar.

2. The ordinances of June 7 and December 6, 1906, impair the obligation of the contracts between appellant and respondent, and are therefore invalid.

1. Appellant's Franchises and Contract Rights.

The first inquiry in this class of cases is whether there is, in fact, any contract, and it is upon this question that the decision of this case depends. The Court below held that there was no contract between the parties, but merely a license revocable at the pleasure of the city.

The only reason for this ruling was that no time was specified for the duration of the rights granted by the ordinances of October 3, 1889, and July 10, 1890, Exhibits "A" and "B".

This case is one of vital importance to appellant since it involves not only the constitutionality of the ordinances, Exhibits "D" and "E", but also whether appellant's right to continue its business of supplying water to Boise City and its inhabitants is dependent upon the mercy or caprice of every city administration.

It was only in pursuance of the city's general control and dominion over its streets, and the alleged absence of any contract right on the part of appellant, that the city assumed to pass the ordinances in controversy.

It does not claim this right under any special statutory authority, and that it does not possess any such special authority and did not enact the ordinance in question under its general taxing power was conceded. It was also admitted that the city does not possess this power under any grant of authority to license, tax or regulate the use or occupation of the streets, or to tax or license franchises or occupations similar to those owned or carried on by appellant. No such constitutional or statutory authority is relied upon or claimed or pointed out by the city, but the right was claimed and the case decided by the Court below, *solely* upon the theory that the appellant's right to use the streets is subject to revocation, at any time, by the city and is, therefore, not a *contract*, and consequently that the city may treat appellant as a trespasser and may exact any price or impose any burdens it sees fit for the continuance of that use, and that the company may be compelled to acquiesce, on penalty of being required to remove its pipes and plant from the city.

It will be noted that the water company in this case is not claiming any exemption from State or municipal taxation or licenses, exacted under statutory authority, or imposed under the police power, for the purposes of regulation or supervision, but the contention of the city and the decision of the Court below show clearly that the so-called tax of $300 per month was upheld *only* upon the ground that

the water company has no contract rights whatever which the city is bound to respect. The validity and extent, therefore, of the company's rights and whether they are within the protection of the contract clause of the Federal Constitution is the vital one in this case.

It is conceded by counsel and by the Court below that unless the grants owned by the water company are revocable licenses, the city could not pass the ordinances, without impairing appellant's contract rights.

The following from the opinion of the Court below, is sufficient to show the question involved in this appeal, and the source of the authority under which the city claimed the right to enact the ordinances in controversy:

> "In other words, the validity of the ordinance of June 7, 1906, is the controlling issue raised by the demurrer, and the validity of this ordinance depends upon the answer to the question, whether the prior ordinances granted a franchise for a fixed period or conferred only a license, revocable at the will of the defendant." (Transcript, page 27.)

The water company takes the position, that the mere fact that no time was specified in those grants does not make them revocable licenses. They possess all of the requirements of contracts. They were entered into by parties who were specificially authorized by statute to make such contracts. They were for valuable considerations, which was the construction of water works and the supplying of pure, healthful water to the city and its inhabitants, which under the demurrer is conceded to have been done. They were grants, on the faith of which, large expenditures were made. There is, we contend, no principle of the law of contracts which requires a term to be specified in grants of that character in order to make them valid obligations between the parties.

The theory of revocable licenses as applied to plaintiff's

rights found its origin in a decision of the Circuit Court of Appeals for the Ninth Circuit between the same parties to this suit. It was the case of

> *Boise Artesian Hot & Cold Water Company, Limited,* v. *Boise City,* 123 Fed., 232; 59 C. C. A., 236.

This is the case upon which the Court below relied principally in reaching its conclusion and it is therefore proper to examine that case at the outset and review briefly the conditions leading up to it.

The question of whether or not this company and its predecessors in interest were required to furnish water free of charge for fire purposes and other great necessities, as provided by Section 2711 of the Revised Statutes, had been in controversy for many years prior to the repeal in 1905 of that part of Section 2711 relating to free water (Transcript, page 11).

In 1895 the question came up before the Supreme Court of Idaho in

> *Boise City* v. *Artesian Hot & Cold Water Co.,* 4 Idaho, 351; 39 Pac., 562,

in which the Court strongly intimated, but did not squarely decide, that Section 2711 was constitutional. The Court said:

> "There seems to be really but little reason, in the view we take of the case, for touching upon the question of the constitutionality of this provision of the law."

Sections 2711 and 2712 of the Revised Statutes were taken verbatim from the Civil Code of California, and were Sections 548 and 549 of that Code, and the free water provision in the former had been upheld by the Supreme Court

of California in San Francisco *v.* Spring Valley Waterworks, 48 Cal., 493, 526; Spring Valley Waterworks *v.* San Francisco, 52 Cal., 111; and San Diego Water Co. *v.* San Diego, 59 Cal., 517.

In 1902 the plaintiff in this case, believing that this question had not been finally settled in Idaho, commenced an action against Boise City in the Circuit Court of the United States for the District of Idaho, based upon diversity of citizenship, for the sole purpose of testing the validity and scope of Section 2711 and determining the question whether the company was required to furnish water to the city for street sprinkling and other similar purposes, free of charge. The city had claimed the right to take water free of charge for that purpose and for flushing sewers and, in fact, for practically every purpose for which the city used the water. The decision in that case on appeal to the Circuit Court of Appeals was written by Circuit Judge Gilbert, and it must be conceded that some of the dictum in that opinion, if applied literally to the case at bar, is against our contention regarding the contract rights of the company, and its predecessors in interest.

We contend, however, that so much of the opinion as refers to that feature of this litigation is entirely gratuitous and dictum; that the question was not at issue in that case, the only question involved therein being whether the city was justified in taking the water for certain purposes, without compensation. The question of the validity of the franchise ordinances and the rights of the company in using the streets was not raised, directly or indirectly, in the litigation, nor could it properly be raised in that suit.

It was not claimed, of course, by the ctiy that the questions involved in this suit are *res judicata* by reason of that decision, because the purpose of the former suit and the cause of action were entirely different from those in the

case at bar. Consequently the judgment was neither pleaded nor proved for that purpose, in the Court below, and the decision is of no force in this case unless it correctly states the rules of law applicable to the facts and issues now before the Court in this suit.

The point decided in that case was that the water company was required under the provisions of Section 2711, as it then existed, to furnish the city with water for street sprinkling purposes free of charge, and as to the correctness of the conclusion reached there can be no question. It is apparent, however, that in upholding the validity of Section 2711, it was unnecessary for the Court to hold that the water company's right to use the streets was merely a revocable license. It is this language in the opinion which led to the enactment by the city of the ordinance in controversy (Exhibit "D"), and some of it is incorporated into that ordinance. It refers to the grant to Eastmans and their successors as "a license for an indefinite period to lay their pipes, etc." In Section 1 reference is again made to "said license." For fourteen years prior to that decision, during which time the plaintiff and its predecessors in interest were using the streets, and during the greater portion of which period a controversy existed as to the right of the city to take water free, the city had never contended that the right to use the streets for laying and maintaining these water pipes was a revocable license. It is, therefore, manifest that the ordinance in controversy is the direct outcome of the decision of the Circuit Court of Appeals, and as that case is practically the only one relied upon by the Court below the question whether that case correctly states the rule of law relating to revocable licenses and franchises is the principal one before this Court.

It is worthy of note that the precise question involved in that case had been previously decided, under the statutes of

California, from which the Idaho statute was taken, by the Supreme Court of California in the cases cited in Judge Gilbert's opinion, and that Court did not find it necessary to determine, or even refer to the right of the cities in those cases, to revoke the rights of the water companies to use the streets of those cities, or the duration of their franchises.

Moreover, it clearly appears that the learned Circuit Judge did not consider or pass upon the rights acquired by this plaintiff under the franchise to the Artesian Water and Land Improvement Company, which is "Exhibit B", page 10 of the Transcript.

We call attention to the following language from that opinion:

> "There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with water for a stated period of time, accepted and acted upon by the grantees thereof, is a grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the State, New Orleans Gas. Co. *v.* Louisiana Light Co., 115 U. S., 650; New Orleans Water Co. *v.* Rivers, 115 U. S., 674; St. Tammany Waterworks *v.* New Orleans Waterworks, 120 U. S., 64."

The principle therein enunciated is unquestionably the law of the land, and has been ever since the Dartmouth College case was decided. Judge Gilbert, however, contends in the opinion that, "inasmuch as no term was fixed for the duration of the privilege and no contract was in terms made between the city and the grantees of the privileges, *that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions.*" (Italics are ours.)

Did not the learned Judge here overlook the provisions at the end of Section 2710 (Transcript, pages 10-11), which protects the city against any perpetual grant by limiting its duration to fifty years? If it is argued in reply to this, that section 2710 only applies to grants to corporations and not to the grant to Eastman Brothers, we maintain, nevertheless, that it would apply to the grantees of Eastman Brothers, who were corporations coming directly within the provisions of that section. In any event the provisions of Section 2710 apply to the grant to the Artesian Water and Land Improvement Company (Exhibit "B", Transcript, page 10), which was a corporation organized under that law, and plaintiff is the owner of the franchise granted to that company. The Court of Appeals said that when the Eastmans transferred their right to the corporation the latter found among the statutes of Idaho the law requiring the company to furnish free water for fire purposes, etc., and that Court very properly held that this part of Section 2711 must be read into the company's charter. If this is true, it is difficult to understand the process of reasoning by which the provisions of Section 2710 cannot also be read into its charter, or at least construed to limit its franchises and thereby relieve them from the objection of being perpetual as well as from the objection of being for an indefinite term.

To further illustrate the point that it was unnecessary for the Court of Appeals to go into that question in deciding the issues in that case, we call the Court's attention to the reasoning of the California Courts on this question.

The correct theory seems to be that the water company was not actually furnishing water *free* for those public purposes. The law authorized the appointment of a commission to fix the rates to be charged for water delivered to the inhabitants of the city, and it is well settled under these and similar provisions that the commissioners must, and the Courts will compel them, in fixing these rates, to take into

consideration the present value of the plant, reasonable expense of running it or operating expenses.

> *San Diego Land Co.* v. *National City*, 174 U. S., 755-56;
> *Smyth* v. *Ames*, 169 U. S., 466, 546, and numerous other cases.

It is evident that if the operating expenses are considered the cost to the company of furnishing the water for those public purposes enters into and forms a part of the rates charged to private consumers, although not paid out of the City Treasury.

Such was the settled construction of the same statute in California, which was Section 4 of the California Act of 1858, but it was held to be abrogated by the new constitution which went into effect January 1, 1880. Spring Valley Waterworks *v.* San Francisco, 61 Cal., 29, where the Court said:

> "It is too plain to require argument, that if the water company is to receive compensation for all the water furnished by it, and that it is, will hardly be denied, the burden under the act of 1858, fell almost exclusively upon the consumers, and the owners of valuable property enjoying the protection and other benefits from the water paid little or nothing. It was to distribute the burdens more equally that the new constitution abolished free water."

Doubtless the same reasons impelled the Legislature of Idaho, in 1905, to repeal that provision.

We refer to these matters for the purpose of showing that the Court of Appeals was under no necessity whatever of passing upon the question of the power of the city to revoke or terminate at its pleasure, appellant's right to use the streets, but might have rested its decision upholding the statute upon the theory adopted by the California Court in construing the same statute.

We submit that it is extremely improbable that the Court of Appeals ever anticipated that such unjust and radical construction could ever be placed upon its language as was done by the City Council in passing the ordinances in question, nor could it have been in the contemplation of the Court that the city officials would ever find in that decision a pretext for claiming the right to revoke the water company's use of the streets.

Exhibit "C" (Transcript, page 12), passed by the city during the heat of the controversy over the "free water" question, shows that prior to the decision of the Court of Appeals, the city itself had admitted that the franchises granted to appellant's predecessors had some definite time to run, and it did not wish by any possible chance to further extend the term to 50 years from the date of Exhibit "C". The city also used the word "franchise" in this ordinance in referring to the grants to appellant's predecessors, but, as we have shown before, after the decision of the Court of Appeals, it referred to them, in Exhibit "D", as a "license for an indefinite period."

The Court holds in this opinion, on page 235, that there can be no doubt that under the provision of the charter before quoted the city had power to grant the use of its streets for a fixed reasonable period of time for the purpose of furnishing a water supply to the inhabitants, but contends, however, that it had no authority to make a perpetual contract and that legislative grants of power to municipal corporations are to be strictly construed. The water company has never contended that it had either a perpetual or exclusive franchise, in view of Section 2710, *supra*. In his opinion, on page 235, Judge Gilbert uses the following language:

> "From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right and that the ordinance operated to grant

> them a license only, and left the city free at any time to revoke the privilege granted, or to put in its waterworks, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water, and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

In support of the position taken by Judge Gilbert, he cites President, etc., Colby University *v.* Village of Canandaigua, 96 Fed., 449. This citation is unfortunate, for it clearly does not sustain the text of Judge Gilbert's opinion. The Canandaigua case simply held that the franchise granted to the water company was not an exclusive franchise, and that the Village of Canandaigua might thereafter construct waterworks of its own, and that it was not required to condemn the works of the company holding the franchise before it could do so. It does not appear that the franchise was limited as to time, yet, the Court in that opinion, treated it as a franchise and nowhere revocable. We, therefore, contend that Judge Gilbert's opinion in this case, as far as the validity of the company's franchise is concerned, is mere dictum, and that the dictum which militates against our contention in the case at bar is not, directly or indirectly, sustained by the very case cited in support thereof. Moreover, this dictum is not sustained by any other decision, so far as we have been able to ascertain, and is controverted and contradicted by a great many of them. It is plain also that Judge Gilbert did not have called to his attention in that case the Idaho statutes controlling corporations furnishing water to municipalities, which we have quoted before in full.

The expression contained in Section 2710 is that "no corporation formed to supply any city or town with water must do so unless previously authorized by ordinance of the authorities thereof," etc.; and the sentence at the end of the

section, *"No contract or grant must be made for a term exceeding fifty years."* Our contention is that the franchise ordinances (Exhibits "A" and "B", Transcript, page 10), to which the plaintiff has succeeded, were passed by Boise City in compliance with the requirements of this section, and that while no limitation as to the time was inserted into these ordinances, yet the words of said section, "No grant must be made for a term exceeding fifty years," must be held to limit these ordinances or franchises and become and are part and parcel thereof. This Section 2710, with Section 2712, is the foundation for the ordinances which constitute the franchise of the plaintiff. All the provisions and limitations of that section must clearly be read into the franchise. Our contention is that this franchise was a "grant" within the meaning of that section, and was clearly limited by that section to a term of fifty years. This matter, evidently, was not called to Judge Gilbert's attention, for the reason that it was not an issue in that case; nor was it raised by the pleadings, directly or indirectly. It is not referred to in his opinion, and it is fair to assume that he did not have it in mind in declaring that the ordinance "operated to grant them a license only and left the city free at any time to revoke the privilege granted." Moreover, Judge Gilbert, evidently, did not have his attention called to Section 2712, Revised Statutes of Idaho, as in force at that time, which clearly gave plaintiff's predecessors, who were created under that title, the right to use the streets, and plaintiff, by a compliance with the statutes relating to foreign corporations, which compliance was not questioned by the pleadings, or in the Court below, acquired, in accordance with the statutes and Constitution of Idaho, the same rights as a domestic corporation organized under that title. If these franchise ordinances are read in connection with Section 2710 and Section 2712, the conclusion is irresistible that the plaintiff water company not only has franchises to use the

streets of Boise City, but that such franchises are valid and subsisting ones until they transcend the limit of fifty years from the date of their passage.

In summing up our discussion of the decision of the Circuit Court of Appeals, we admit that its conclusion upholding the free water clause of the statute was proper and in accordance with the decisions of the Supreme Courts of California and Idaho, but contend that so much of that decision as touches upon the right of the city, at any time it sees fit, to terminate the company's right to occupy the streets for supplying water, should have no weight whatever with this Court in deciding the case at bar, for the following reasons:

1. That it was unnecessary to the decision of that case and merely dictum.

2. The Court manifestly overlooked that part of Section 2710 limiting the duration of contracts and grants of that character, and also overlooked Section 2712.

3. The Court by not admitting a middle ground between perpetual franchises and licenses revocable at will, disregarded those well recognized legal rights consisting of licenses, on the faith of which the grantee has made expenditures, thereby acquiring contract rights which are not revocable at will, numerous examples of which we call attention to in a subsequent part of this brief, and also overlooked the question of equitable estoppel upon the part of the grantor.

4. The ordinance "Exhibit B" (Transcript, page 10) was not considered by the Court.

We will now refer to a few of the numerous decisions of this Court since the Dartmouth College case, which hold that the grant by a State or municipal corporation under authority from the State, of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of this

service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States, against State legislation to impair it.

This rule was very clearly and succinctly stated by this Court in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, 9, in the following language:

> "This Court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

Citing

> *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 660;
> *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674;
> *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S., 64;
> *Crescent City Gas Light Co.* v. *New Orleans Gas Light Co.*, 27 La., Ann., 138, 147.

The Court also held that this power to grant such franchises may not only be exercised by the State directly but also indirectly through the agency of a municipal corporation invested with the necessary authority, citing

> *State* v. *Cincinnati Gas Co.*, 18 Oh. St., 262, 293;
> *Wright* v. *Nagle*, 101 U. S., 791;
> *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S., 258, 266;

Bacon v. *Texas*, 163 U. S., 207, 216; and
New Orleans, etc., Co. v. *New Orleans*, 164 U. S., 471.

In addition to the foregoing, the following recent decisions by this Court are all to the same effect:

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S., 558, 577-78;
Vicksburg Waterworks Co. v. *Vicksburg*, 185 U. S., 65, 80-82;
Vicksburg v. *Waterworks Co.*, 202 U. S., 453;
Vicksburg v. *Waterworks Co.*, 206 U. S., 496.

The same principle has been applied to grants of the right to use streets for railroad tracks.

Cleveland v. *Cleveland City Ry. Co.*, 194 U. S., 517;
Northern Pac. Railway Co. v. *Duluth*, 208 U. S., 583, 591.

See also

Pearsall v. *Great Northern Ry.*, 161 U. S., 660.

Under the charter provisions before quoted it is apparent that the ordinances of Boise City have the force and effect of State laws within the meaning of the contract clause of the Federal Constitution.

Westin v. *City Council of Charleston*, 2 Peters, 462;
Bacon v. *Texas.*, 163 U. S., 207, 216;
The Walla Walla case, supra, page 9;
Mercantile Trust Co. v. *Columbus*, 203 U. S., 311-320, and cases there cited;
Davis & Farnam Mfg. Co. v. *Los. Angeles.* 189 U. S., 216-17.

In the case last cited the Court, speaking by Mr. Justice Brown, said:

> "As the bill in this case is based not only upon diversity of citizenship, but upon the alleged unconstitutionality of the municipal ordinances of November 25, 1901, and March 3, 1902, as impairing the obligations of Mrs. Dobbins' contract with the city under prior ordinances, an appeal lies directly to this Court, and upon such appeal the whole case is opened for consideration. Horner *v.* United States, No. 2, 143 U. S., 570; Chappell *v.* United States, 160 U. S., 499. The State having delegated certain powers to the city, the ordinances of the municipal authorities in this particular are the acts of the State through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a State law within the meaning of Section 5 of the Circuit Court of Appeals Act. City Railway Co. *v.* Citizens' R. R. Co., 166 U. S., 557; Penn. Mutual Life Insurance Co. *v.* Austin, 168 U. S., 685, 694; St. Paul Gas Light Co. *v.* St. Paul, 181 U. S., 142, 148."

See also Taylor on Juris. & Proced. of U. S. Sup. Ct., Section 86, pages 135-36.

While it is true that in many of these cases the ordinances or contracts limited the duration of the rights to a specified time, it is equally true that no opinion of this Court from its earliest history down to the present time, has ever held that the specification of a fixed period of time was necessary to the validity of the grant, or necessary to make it a valid contract, within the protection of the Constitution of the United States, and in none of these cases does the Court attempt to nullify a franchise or declare it a mere license, on the ground that it is not limited as to time. Such a doctrine has never been announced anywhere, except by Judge Gilbert in the case before referred to, and by the Court below.

On the contrary this Court has recognized the validity of perpetual grants of that character when it was within the power of the State or municipality making the grant to confer perpetual rights, and when the right to alter or repeal the grant was not reserved.

Of such a character was the grant of 1769 by the Crown to the Trustees of Dartmouth College; and also the grant by the State of Georgia, in Fletcher *v.* Peck, 6 Cr., 136; where Ch. J. Marshall defines a contract and a grant of this character.

The true rule would seem to be that the extent of the grant is only limited by the authority of the city granting it. The respondent was limited under Section 2710, *supra*, to making grants for not longer than fifty years. The language used in this statute that "no contract or grant shall be made for a term exceeding fifty years," was obviously intended as a limitation upon the power of the city authorities, and the Legislature must be presumed to have enacted this provision for the purpose of changing the common law rule that grants of this character without limitation of time when complied with by the grantee, are perpetual, and for the purpose of causing all grants thereafter made to terminate at the end of fifty years, unless the term was limited in the grant itself to a shorter period, or unless there was a reserved right of repeal. But in the grants under which the water company is acting the city did not reserve any right to alter, amend or repeal the same, and there was no statute in force at that time, nor has there been any since, giving the city that right.

For sixteen years until the passage of the ordinances, Exhibits "D" and "E", in controversy herein, the city and State have always recognized the right of appellant and its grantors, under those ordinances, to lay down and maintain their water pipes in the streets and alleys of the city and permitted it to erect and maintain an expensive plant and have accepted the benefits accruing to the public by reason of the furnishing by the company of pure and healthful water, and the city had dealt with the water company in the matter of fixing rates as late as a year previous to the pass-

age of the last named ordinances. In the face of these facts the city seeks now, on a mere technicality, itself without merit, to declare its own grants mere licenses, which it may revoke at any time.

The question presented is whether in view of the character of these grants, the laws in force at the time they were made, the situation of the parties and the surrounding circumstances, they were properly held by the court below sitting as a court of equity to be revocable licenses.

To uphold the contention of the city, that the grants in question are revocable licenses, the court below also invoked the familiar rule that grants of this character must be construed most strongly in favor of the public and against the grantee and that nothing is granted by implication, and that a municipal corporation must not be shorn of its powers by mere implication.

The rule referred to, we contend, is one of construction, while the question here relates, not to the construction, but to the duration, of the grants.

This rule, we submit, ought not to operate to terminate or destroy grants made under express sanction of a state statute and which have become vested interests, but should only be invoked to construe ambiguities in the terms of such grants.

This rule should not be held to give to the city or state the authority, which neither the state constitution nor statutes have given them, of altering, amending or repealing charters or franchises, and which was not reserved in the grants themselves. Neither should it prevent an inquiry into the policy of the Legislature of Idaho, with reference to such grants and the intention of the parties as gathered from the facts and surrounding circumstances at the time the grants were made, nor be held to modify the common law rule, hereinafter referred to, relating to grants to individuals or cor-

porations where no term is expressed for the enjoyment of the privilege granted.

The policy of the Territory and also of the State of Idaho, with reference to the duration of grants to supply water, is shown by Section 2710 of the Revised Statutes of 1887. Fifty years was considered a reasonable time for the duration of such a grant in a community as sparsely settled as Idaho, and where it was not permitted to be made exclusive, and in this the wisdom of the Legislature is apparent, since it is obvious that persons with capital could not be induced to invest money in enterprises where the returns were so uncertain, unless ample time were allowed for a probable increase in population sufficient to justify the investment. Unless such were the case, a water company would be unable to sell its bonds or borrow money on its property, as is nearly always necessary, in order to build its plant. Such was also the policy in California from which Section 2710 was taken verbatim (Cal. Civ. Code., Sec. 548).

As to the intention of the parties when the grants were made, which, it seems to us, should also have a bearing upon the question, it would seem incredible that persons investing money in a plant to supply the city with water would do so with the understanding that the city might, at any time, revoke their right to lay and maintain their pipes in the streets, or impose any burdens it might choose.

The Court held that this was not an unreasonable supposition (Transcript, pages 32-33), but said that regardless of what might have been the intention of the parties, the rule announced by this Court in Knoxville Water Company *v.* Knoxville (200 U. S., 22) that grants of special privileges, affecting the general interests, are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers.

The distinction between that case together with the numerous other authorities announcing the same doctrine, and the case at bar, is obvious. The question presented in those cases was as to the construction of the language of the grants and not as to the power of the city to cause their forfeiture. After these cases were decided the owners of the franchises involved possessed exactly the same rights as before, but the Court merely refused to extend the language of those grants to prevent the city from putting in its own water works or from granting franchises to others, where it had not expressly agreed in the grant not to do so.

In the discussion of the Knoxville case, in the opinion of the court below, (Transcript page 32), and its application to the case at bar, the result is both novel and startling, and carries the principle involved in that case to a point beyond which this or any other court has ever gone. The court virtually held that, since in the Knoxville case the water company could not claim an exclusive privilege because its grant from the city did not contain an express agreement that the city would not construct its own water works, therefore this plaintiff cannot be heard to claim that its franchises are exempt from forfeiture, because in its grants from the city it was not expressly agreed that the city could not declare them forfeited at will.

In other words the anomalous conclusion is inevitable that the right to declare a forfeiture, which is so repugnant to equity, should rest, by analogy, upon the same footing as the right to declare a grant not to be exclusive, when it does not purport to be, and that the right of forfeiture can always be resorted to unless the city expressly agrees not to. The fallacy of this argument answers itself.

Some of the reasoning of the learned Judge in reaching his conclusion is also worthy of note. He said:

> "It is conceded that at the end of fifty years the plaintiff's franchise would lapse, and that it would,

> from that time on, occupy the defendant's streets at the defendant's pleasure. *In other words*, it would be in the same condition at that time, under its construction of the ordinance, as it now is under the defendant's construction." (Trans. pp. 31-2.)

This observation was doubtless made in all seriousness, but it is obvious that it is a matter of vital concern to appellant and its stockholders and creditors, whether such alleged right of forfeiture may be exercised by the city at any time, or whether it must be postponed for about 30 years longer.

The adoption of plaintiff's contention in the case at bar would not as in the Knoxville case deprive the city of any of its governmental powers. The city of Boise has the undoubted right to put in its own water works or grant franchises to others for that purpose and the water company does not claim that such action by the city would impair its franchises in the constitutional sense, although such action might indirectly destroy the value of its plant. The bill alleged that plaintiff and its predecessors in interest have at no time claimed and do not now claim that their franchises for the use of the city's streets and alleys and the supplying of water to its inhabitants are perpetual or exclusive. (Transcript page 4, f. 6.)

The learned Judge of the Court below construed this allegation practically as an admission that plaintiff's franchises are revocable at will and adopts, as conclusive, the statement of Judge Gilbert that they must be either perpetual or revocable at will, and that since plaintiff admits that they are not perpetual it follows that they are revocable at the pleasure of the city. (Transcript page 27-28.) The logical result of that position would be that only perpetual franchises are safe from impairment or revocation at the hands of municipal authorities regardless of the expenditures which may have been made on the faith of the other grants,

and in utter disregard of the time limit imposed upon franchises of this kind, by section 2710 Rev. St.

The court below, in the opinion found at the bottom of page 26 of the Transcript, clearly misinterpreted the argument of plaintiff's counsel, where it states that they conceded that if the ordinances conferred a license only, the defendant might either revoke such license absolutely or impose as conditions for the further continuance of it, additional burdens such as the ordinance in controversy. The plaintiff's counsel endeavored to argue there as they do here that under whatever names these ordinances (Exs A and B.) may be designated, whether as "consent" to use the streets, "grants" or "licenses" or franchises," after they have been accepted and acted upon and the expenditures made thereunder, as shown by the bill in this case, they are not subject to revocation by the city, except for breach of some condition and then only in a proper action instituted for that purpose.

There is nothing, we contend, in the record, which justified the court in also supposing that the intention of the parties was that these grants should be revocable at the will of the city. On the contrary every logical conclusion based upon ordinary business transactions, tends directly to the opposite result.

Practically the same question was before this court in the case of *Detroit* v. *Detroit Citizens St. Ry. Co.*, 184 U. S. 368, 398. The city under authority given by statute, had granted its consent to the street railway company to lay its tracks in the streets and had specified the rate of fare to be charged, and attempted thereafter, by ordinance, to reduce this rate, claiming the right by virtue of certain laws of the State in force when the contract was made and certain reservations in the grant, of the right to make further rules, orders or regulations, and also on the ground that such was the intention of the parties. The court discussing the intention of the parties, on page 384 said:

> "Can it be possible that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate it road through the streets in language which as to the rate of fare amounted to a contract, and gave the company a right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation of its road, but that by the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe and efficient running of the cars, the character of service, the speed and number of cars and their hours of operation and matters of a like nature, such as are described in the opinion of the court below in this case."

On page 398, the court, on the same subject, also says:

> "It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company."

Clearly the right of this plaintiff to continue to carry on its business and use the streets without arbitrary interference by the common council, is as fundamental in its nature and as vital to this plaintiff and its grantors, as was the right

of the street railway company in that case to charge a certain fare. The reasoning of the court applies with greater force to this case, since the city does not even claim the right to pass the ordinances in controversy, under any power reserved in the grants or under that part of section 2712, *supra*, which gives the city the right to prescribe "reasonable rules and directions as to the mode or manner of using such right of way within the city." It does not claim it, therefore by virtue of the *construction* in favor of the public of any *language* in the statutes or in the grants themselves, but because of the absence in the grant of language limiting its duration, although the statute itself supplies such language.

In the case last cited the court also recognizes another principle of law which we think applies to this case. It was in relation to a grant to a corporation of a franchise to use streets, which was not by its terms limited or revocable, and arose in connection with the discussion of a grant of a franchise for a period longer than that for which the corporation itself was chartered, and whether in such case the franchise itself would terminate with the life of the company holding it. The court approves of the rule followed in People *v.* O'Brien, 111 N. Y. 1, and the other cases cited,

> "That a corporation although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation, of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the right granted to be exercised by the corporation, or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case in 123 N. Y. announces the same doctrine." 184 U. S. 395.

The true rule applicable to this case would seem to be that the grants to use the streets of the city were in fee, unless the operation of section 2710, *supra*, would serve to limit their duration to the period therein prescribed, and this the plaintiff admits.

Appellant contends therefore that the grants should be construed in connection with the statutes and that they would not continue in force after the 50 years limitation in the statute had expired, if the question were then raised by the city.

It is well settled by the decisions of this court, that the laws of a State existing at the time a contract is made, which affect the rights of the parties, enter into and become a part of such contract.

In the case of *Von Hoffman* v. *City of Quincy* 4 *Wall.* 550, Mr. Justice Swayne, in delivering the opinion of the court said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

To the same effect:

> *Tomlinson* v. *Jessup*, 15 Wall 457;
> *Walker* v. *Whitehead*, 16 Wall 314, 317;
> *Edward* v. *Kearzey*, 96 U. S. 595, 601;
> *Brine* v. *Insurance Co.*, 96 U. S. 627, 634, 637;
> *Pritchard* v. *Norton*, 106 U. S 124;
> *Pinney* v. *Nelson*, 183 U. S. 144, 148.

We contend that the proper and natural assumption in this case is that the grants in question, especially that to the Artesian Water and Land Improvement Company, its successors or assigns, were made in view of and in accordance

with section 2710 of the Revised Statutes of Idaho, and that the grants would continue in force if complied with by the grantees and their successors, for the period of time permitted by the statute, and that the same rule applies to the grants to the Eastmans "and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City."

In *National Waterworks Co.* v. *Kansas City*, 65 Fed. 691, 695, the question arose as to the permanency of the right of the National Waterworks Company, to use the streets and alleys of Kansas City, Kansas, under an ordinance which for a consideration of $10,000, granted to that company, its successors and assigns, the right to lay and maintain water mains under or over any stream and along, upon and across the streets, alleys and other public grounds of the city. No term was specified for this right. Mr. Justice Brewer, in the opinion of the court used this language:

> "The ordinance was accepted and the $10,000 paid. There is no limitation expressed as to the matter of time, and the language imports permanence of right, for it is to lay and maintain." Page 696.

Kansas City attempted to have this right limited to 20 years under a provision of a statute, which was held, however, to apply only to rights granted "for the purpose of conveying water *to* any city in that State or any other State," and therefore did not apply to the franchise in question. The provision of that statute which the city contended should limit the right was as follows:

> "No grant or contract provided for in the preceding section shall continue for a longer period than twenty years."

This, except as to the time, is in effect the same as the provision in section 2710, *supra*, which provides:

> "No contract or grant must be made for a term exceeding fifty years."

The most that Kansas City could or did contend for was that this clause, if it applied to the franchise of the National Waterworks Company, operated to limit its duration to twenty years. The Court found that it did not so apply, and on page 698 said:

> "I am clearly of the opinion that the ordinance is within the power given by the act, and secures to the company and its assigns a permanent right."

This case clearly supports appellant's contention that section 2710 Rev. St. of 1887, operates to limit and fix the duration of the franchise granted to the Artesian Water and Land Improvement Company, its successors or assigns, to the period of fifty years mentioned in that section.

The opinion in National Waterworks Co. *v.* Kansas City, *supra*, is in point on another question and also shows that even a parol license to use a right of way when so far executed as to vest in the water company a right of occupancy and use and under circumstances which would amount to an equitable estoppel could not be revoked. It related to the use, by the water company for laying its pipes, of the right of way of a railroad company and we can see no reason why a city in its business dealings should not be held to the same degree of fairness as individuals or private corporations. The court on page 604 said:

> "The rule is recognized in this State, as elsewhere, that where one party enters upon the real estate of another under a parol license from the latter, and at large expense constructs an improvement which is necessary for the successful carrying on of the business of the licensee, the licensor is estopped to deny the right of the licensee to continue such occupancy and use, so long as the necessities of his business require."

It would seem that the rule should apply with greater

force to a written grant made for a valuable consideration. The court then cites a large number of American and English cases to the same effect and quotes the following language of Messrs. Hare & Wallace, in their note to the leading case of Rerick v. Kern, (14 Serg. & R. 267;) 2 Am. Lead. Cas. (5th Ed.) 569:

> "From the cases which have been cited, we may deduce two things: * * * * A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, or placed with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it, and thus placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises under these circumstances, to prevent the legal title from being used as a means of injustice."

This doctrine of equitable estoppel applies as well against municipal corporations as individuals or private corporations where the municipal corporation does not exceed its powers in making the grant.

In *Monongahela Navigation Co. v. United States*, 148 U. S., 312, 335, this Court applied the doctrine of equitable estoppel against the United States and the State of Pennsylvania, where the former sought to remove improvements which were constructed in a navigable river by a corporation at the invitation of the United States and under authority granted by a charter of the State, and for the use of which the company was allowed to charge tolls.

This case also recognizes the distinction between a mere revocable license, which the grant of the right to the navigation company was claimed to be, and a contract. On page 344 the Court said:

> "We do not understand that the supreme court of Pennsylvania has ever ruled that a grant like this is a mere revocable license. The cases referred to by counsel are those in which there was simply a permit; but there was a chartered right created,—the right not merely to improve the river, but to exact tolls for the use of the improvements,—and such right created by an act of incorporation, as long ago settled in this Court in Dartmouth College Trustees *v.* Woodward, 4 Wheat, 518, is a contract which cannot be set aside by either party to it."

There was no limitation of time specified for the enjoyment of the grant in that case.

On the question of equitable estoppel in a case similar in many respects to the case at bar, the Circuit Court of Appeals of the Eighth Circuit in Omaha Water Co. *v.* City of Omaha, 156 Fed., 922, held that "a municipal corporation in respect of its purely business relations as distinguished from those that are governmental is held to the same standard of just dealing that the law prescribes for private individuals."

In Union Depot Co. *v.* St. Louis, 76 Mo. 393, 396, it was held that where a city had granted a franchise to a Union Depot Company to use, and occupy streets and the company had erected costly buildings thereon, the city cannot afterwards object. The Court said: "When a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals."

In *Old Colony Trust Co.* v. *Wichita*, 123 Fed., 762, the Circuit Court for the District of Kansas held:

> "A franchise granted by the City of Kansas to a telephone company to erect and maintain its poles and wires in the streets, no term being stated, under the laws of the State continues for 20 years, and during such term the city has no power to nullify it, in the absence of any provision therein reserving such right." Affirmed on appeal in 132 Fed., 641.

In the case of

Govin v. *City of Chicago*, 132 Fed., 848,

before Circuit Judges Grosscup and Jenkins, the duration of a grant to a street railway company, was considered, and the Court said:

> "The next inquiry is this: What is the period, or lifetime of this legislative grant? In the absence of controlling language to the contrary, the life of the grant is the period fixed for the life of the corporation. On this the decisions are unanimous." Page 855.

See also

Turnpike Co. v. *Illinois*, 96 U. S., 63,

where it was held, that a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation.

In Des Moines City Ry. Co. *v.* City of Des Moines, 151 Fed., 854, a grant was made in 1866 by a city to a street railroad company, its successors and assigns of the right to lay tracks in any of the streets, and to operate thereon cars, and there was no limitation of time for the duration of the grant, but it contained a proviso that the right granted should be exclusive for 30 years. In 1905 the City Council passed a resolution treating the company as a trespasser and ordering it to remove its tracks from the streets. The Court held that there being no statute in force limiting the duration of this grant at the time it was made, its exclusive character only, was terminated at the end of 30 years and that the grant was in perpetuity and created a contract which the city could not impair. The street car company was granted an injunction restraining the enforcement of the ordinance on that ground, and also on the further ground

that the city was estopped by its acts from insisting upon a different construction of the contract.

We will now refer to some of the authorities from the highest State courts involving this identical principle.

In *City of New Orleans* v. *Telephone & Telegraph Co.*, 40 La. An., 41; 3 So., 533, referred to in the opinion of the Court below, the city granted permission to use the streets by an ordinance which specified no time for its duration. The ordinance, which was alleged to impair this privilege, provided that

> "no poles shall be allowed to be erected, or any subsisting poles be allowed to remain," in certain specified portions or the city, "except on the payment of $5.00 per annum per pole for every such pole erected or at present in use within that section of the city * * * said payment to be in consideration of the privilege and advantage of entering upon, using and permanently occupying the streets, ways and places of the city for private property, and to be paid annually in advance commencing January 1, 1884."

The company had 600 poles within the section designated, on which the city claimed $3,000 was due, and was seeking to enjoin the company from using them until payment was made.

The Court first disposed of the contention that the ordinance was a police regulation, by showing that it was, by its terms, an exaction as a "consideration for the privilege." That no consideration whatever of public morals, health or convenience was involved. That it was not proposed to abolish the use of poles or to alter their location, construction, or use in any way to subserve the public comfort. That the simple requirement was the payment of a price, on payment of which the status quo continues; while, without such payment it must cease. The Court said that the case presented no feature of an exercise of police power.

The Court then proceeded as follows:

> "The only remaining question is whether, after granting the defendant authority to construct and to maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city, after the defendant has, at great expense, established its plant and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now exact this large additional consideration for the continued enjoyment of privileges already granted. If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of return. If she can impose a charge of five dollars per pole, she can, with equal power, impose one of $1,000, and for that matter, she could arbitrarily revoke the grant at her pleasure. Either she is bound, according to the terms of her proposition accepted and acted upon by the defendant, or she is not bound at all. Obviously, upon the clearest consideration of law and justice the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new or more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the Dartmouth College case, 4 Wheat., 518."

There was also a provision in the city ordinance in that case more favorable to the city than any found in the case at bar. It was "That all acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning the same." The city contended that this converted the ordinance into a mere revocable permit. But the Court said:

> "The city's construction of this section is strained and unreasonable and conforms neither to its spirit or letter. It is not conceivable that the grantee would have invested its means in such an enterprise, had it imagined that the term and condition of its enjoyment of the privileges lay at the mercy of the city. If any such unreasonable intention lurked in the minds of the Council which passed the ordinance, the grantor

> under familiar rules of construction, came under the obligation of expressing it clearly and unambigously."

This case was cited with approval by this Court in

St. Louis v. *Western Union Tel. Co.*, 148 U. S., 103.

In *Suburban Electric Light & Power Co.* v. *East Orange* (Court of Ch. of N. J.), 41 At., 865, the right to use the streets was given by general statutes of the State, as in the case at bar, with the proviso that the consent of incorporated cities and towns must be first obtained. The consent was given by resolution dated October 14, 1895. The rest of the facts in point are best stated in the language of the Court:

> "No right was reserved to the township authorities in the resolution of October 14, 1895, to revoke the same, nor was any limitation fixed upon the time during which the wires strung under it should remain. A resolution rescinding that resolution was, after the stringing of the wires, passed by the municipal authorities, and it is claimed by the defendant that it was authorized to make such rescission, and that, when rescinded, the authority of the complainant to maintain its wires was destroyed. This argument is based upon the ground that the permission was a mere license, revocable at the pleasure of the licensor. I am unable to adopt that view. Considering it as a mere license, it is still a license which has been acted upon, and may not be revoked at the pleasure of the licensor. In support of this proposition I refer, without citing at length, to the clear and forcible language and reasoning of Justice Reed in the case of Hudson Telephone Co. *v.* Jersey City, 49 N. J., Law 303, 8 Atl., 123, at pages 305, 306, 49 N. J. Law, and pages 124, 125, 8 Atl. Moreover, the complainant's right to string the wires does not depend alone, if at all, upon the consent of the municipal authorities; it relates back to the legislative authority to string and maintain the wires upon certain conditions. No time is fixed by the legislative authority for the continuance of the exercise of the franchise and the grant must be presumed to be perpetual, subject, it may be, as it probable is, to the right of the Legislature to exercise upon it its police powers from time to time, as it in its wisdom may see fit."

This decision was affirmed by the Court of Errors and Appeals of New Jersey, 59 N. J. Eq., 563; 44 Atl., 628, on the ground that it was not even necessary for the company to obtain the consent of the township before stringing its wires, as it had that right directly from the State.

In *Rutland Elec. Light Co.* v. *Marble City Elec. Light Co.*, 65 Vt., 377; 26 Atl., 635, the Court recognizes the following principle:

> "So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee, by a compliance with its conditions, becomes a contract which the city cannot abolish or alter, without consent of the grantees."

The Supreme Court of Illinois has recognized the same principle.

Chicago Municipal Gas Light & Fuel Co. v. *Town of Lake*, 130 Ill., 42; 22 N. E., 616, in which permission was given by the city to lay gas pipes in the streets, and to maintain and repair the same, no time being specified for the duration of the right. The Court held that such a grant when acted upon was not a mere revocable license, but a contract.

To the same effect is

> *Gregsten* v. *City of Chicago*, 145 Ill., 451; 34 N. E., 426,

where the Court construed the grant to be perpetual.

The Supreme Court of Michigan made a similar ruling in a case similar to the one at bar:

Wyandotte Elec. Light Co. v. *Wyandotte*, 124 Mich., 43, 47; 82 N. W., 821, was a suit by the Electric Light Co. to restrain the city from revoking its franchise and the question of the duration of the franchise was discussed in relation to

the following facts: The right to use the streets for electric light purposes, was given, by the laws of the State, only to those corporations organized under the electric light companies act. The plaintiff was not organized under that act, but under the general manufacturer's act, but it obtained the "consent" of the city before using the streets. No time limit was specified in the grant or ordinance giving this consent.

After quoting the terms of the electric light company's act, which is similar in substance to the water company's act of the State of Idaho, the Court said:

> "An incorporation under this act, a petition to the city to erect poles and wires, or for a franchise for that purpose, and the grant of the same by the city, would make a contract, binding for the life of the corporation. It would be immaterial that no time for the existence of the right of the franchise was specified. The grant in such case would be limited to the period of existence fixed by the charter. If a railroad company were organized for a period of 30 years and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here. St. Clair County Turnpike Co. *v.* Illinois, 96 U. S., 68."

In the case of the *City of Los Angeles* v. *The Los Angeles City Water Co.*, 61 Cal., 65, the Supreme Court, in Bank, held that a license imposing upon all persons or corporations, not municipal, vending water for domestic purposes, monthly rates or licenses was void. The Court held that the Water Company had previously obtained its license or permission to use the streets and vend water, and that the city could not, of its own motion, increase the amount to be paid for the privileges granted. The Court cites and quotes from Stein *v.* Mayor of Mobile, 49 Ala., 362, showing that the ordinance complained of is not a police regulation but was a tax in restraint of a privilege already granted to carry on its

business in the city, and, being an impairment of the original grant, was void. The Court used this language which is in point here:

> "The principles enunciated in the foregoing cases, are eminently sound and just, and are directly applicable to the case we are now considering. The City of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterwards to impose additional burdens as a condition to the exercise of the rights and privileges granted."

This Court in *Los Angeles* v. *Los Angeles City Water Co.*, (*supra*), 177 U. S., 577-78, cited that case and quoted the above language with approval.

In *Arcata* v. *Arcata & Mad River R. Co.*, 92 Cal., 639, 644, the town trustees made an order dated March 9, 1885, granting to the railroad company "the right to lay and maintain a side track" on certain streets "subject to such rules and conditions as the board of trustees may think proper and just."

There was no limitation of time during which this right might be enjoyed.

The Court, on page 645, said:

> "There is no merit in the contention that the order of March 9, 1885, was a mere license revocable at the pleasure of the board. After the defendant had acted upon the terms of the order, and expended money in the construction of the road, the board could not rescind or recall the privilege it had granted, unless the company failed to comply with the terms or conditions of the grant."

In *Savage* v. *City of Salem*, 23 Ore., 381; 31 Pac., 832; 37

Am. St., 688; 24 L. R. A., 787, the city granted plaintiff permission, for an indefinite time, to erect tanks in certain places on the public streets to supply water for street sprinkling purposes. The city attempted to revoke the license, and contended: *First*, that the city had no power to authorize the erection of the tanks because they were for a private purpose and therefore nuisances per se, which could be abated at any time, and, *Second*, that, if this is not so, the permission to erect them was but a mere license, revocable at the pleasure of the city.

After holding that the tanks were for a public purpose and not a nuisance, on the second point the Court stated the rule in the following language:

> "After the municipality has granted a license or franchise to a private person or corporation to occupy a portion of a street for public purposes, and the licensee has acted upon such grant, and expended money on the faith thereof, the city cannot revoke the license without compensation to the owner, unless the erection or structure so authorized is, or has in fact, by subsequent use, become, an actual nuisance. 1 Dill. Mun. Corp., 314; Hudson Tel. Co. *v.* Jersey City, 49 N. J. Law, 303; Com. *v.* City of Boston, 97 Mass., 555."

The Supreme Court of Alabama followed the same rule in

> *Port of Mobile* v. *Louisville & Nashville Railroad Co.*, 84 Ala., 115; 4. So., 106; 5 Am. St. Rep., 342.

The permission to use the particular street in that case was granted by the city under authority from the State, and was without limitation as to time.

The Court held that the privilege thus granted was a franchise of the most valuable kind, and could not be revoked by the city.

In Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind., 107, there was no time limit in the ordinance granting the

use of the streets for laying and maintaining the gas pipes. It was held that such a grant is a legislative contract investing the company with the right of property in the franchise thus granted which the city cannot take away or impair, without the company's consent, by any subsequent act, unless such right is reserved.

In *Milhau v. Sharp*, 27 N. Y., 611, the Court of Appeals of New York, held:

> "A resolution of the common council, authorizing private persons to construct and operate a railroad upon certain conditions without limitation as to time, or reserving a power of revocation, is not a license nor an act of municipal legislation merely, but a contract, which, if valid, it could not abrogate."

The resolution of the council was held to be beyond its powers and void, but the Court carefully considers the effect and duration of the privilege when acted upon, if the council had the power to grant it. The Court considered it, not an act of legislation, but a contract

Judge Selden in delivering the opinion of the Court said:

> "Upon its acceptance (if valid) it became a contract between two parties, binding each to the observance of all of its provisions. It was something more than a mere executory contract between the parties. It amounted also to an immediate grant of an interest, and, it would seem, of a free hold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it."

Again on page 622, the Court said:

> "The defendants' counsel insist that the resolution

is not a contract but a license, revocable at the pleasure of the common council. This position cannot be reconciled with the decision in The People *v.* Sturtevant, *supra,* nor with the principle declared by the Supreme Court of the United States, in the Dartmouth College case (4 Wheat., 519), and other kindred cases, in substance, that grants of such franchises, though made by acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified, except in accordance with express reservations contained in the grants. No such reservation is made by the resolution in question, and the privileges which it grants, if within the power of the common council, are already beyond the control of any future act of that body. (Smith's Com., Sec. 252, 253)."

The same Court had uniformily held that such grants without limitation in the grant itself or the general law, were perpetual, if within the authority of the city authorities:

People v. *Sturtevant,* 9 N. Y., 263;
David v. *Mayor,* 14 N. Y., 506;
Mayor v. *Railroad Co.,* 32 N. Y., 261;
Railroad Co. v. *Kerr,* 72 N. Y., 330;
People v. *O'Brien, (supra)* 111 N. Y., 1;
Re Brooklyn, 143 N. Y., 596.

In *People ex. rel. Flatbush Gas Co.* v. *Coler,* 103 N. Y. Supp., 590, the gas company obtained from the park department the consent to lay its pipes in Ocean Parking. The first question presented was whether the company obtained the consent of the proper authority. After holding that it did, the Court considers the identical question involved here. The Greater New York Charter, prohibited the granting of the franchises for a longer period than 25 years, and another section prohibted perpetual franchises. There was no limit of time specified for the privilege given the gas company of using that street for supplying its private consumers, and this consent was given just three months after the Greater

New York Charter took effect. It was contended that this grant was void as being an attempt to grant a perpetual franchise, and the case of Blaschko *v.* Wurster, 156 N. Y., 442, (cited by the Court below) was relied upon in support of that contention. The Court held that because the municipal authorities could have given such consent or made such contract for 25 years and as the company has been in the use and possession of its wires and conduits furnishing lights for ten years, and extending its operations during that time by permission of the city departments, that its franchise was at least good for 25 years. The Court also distinguishes the Blaschko case and states that the franchises attempted to be granted in the latter case evidenced bad faith and deliberate breach of duty on the part of the authorities.

This was affirmed by the Supreme Court, Appellate Division, on the opinion of the Court below, in 105 N. Y. Supp., 1137. The case went to the Court of Appeals and on this point was sustained in the following language of the Court:

> "Concededly, this contract, executed by the Commissioner of Public Parks, did, by its terms, confer upon the respondents the right to use its conduits laid in the parkway for the purpose of supplying electricity to private consumers, and the only question left in that connection is whether said official had the power to give any such consent."

The Court held that the Common Council was the proper authority to give the consent and reversed the case on that ground. People ex rel. Flatbush Gas Co. *v.* Coler, 190 N. Y., 269.

In the *Citizens' Water Co.* v. *Bridgeport Hydraulic Co.*, 55 Conn., 1, there was no limit for the duration of the grant. It was "the sole and exclusive right * * * of laying down pipes * * * for supplying the city and its inhabitants with water so long as a full and pure supply is furnished."

The Court upheld the grant, saying: "It is, as a lawful contract between two natural persons of full legal capacity, sacred from any judicial construction."

In *Borough of Shamokin* v. *Shamokin St. Ry. Co.*, 178 Pa. St., 128; as far as the report shows, there was no limitation to the duration of the right to occupy the streets. The Court recognized this right when acted upon to be a contract, and said:

> "We agree with the learned trial judge that it was not in the power of the borough to change the contract and increase the liability of the defendant, without its consent."

To the same effect are

> *Northwestern Tel. Ex.* v. *Minneapolis*, 81 Minn., 140;
> *Providence Gas Co.* v. *Thurber*, 2 R. I., 15.

The Court below in support of its decision cited Blaschko *v.* Wurster, 156 N. Y., 442 (*supra*), but the distinction between that case and the case at bar is apparent from the very language quoted by the Court below. What the railroad applied for and the alderman voted was a perpetual right, which it endeavored to obtain just prior to the taking effect of the Greater New York charter, under which such grants were limited to 25 years, but it was found that this charter had previously gone into effect, and that a perpetual franchise was therefore void. In People *v.* Coler, *supra*, the Court said that there was evidence of bad faith on the part of the municipal authorities in Blaschko v. Wurster. In Elliot on Railroads (2 ed.) Sec. 1906i, the author expresses doubt as to the correctness of the Blaschko case, and says that "the consent appears to have been granted on another theory and not in pursuance of authority of the governing statute."

2. The ordinances of June 7 and December 6, 1906, (Exhibits "D" and "E") impair the obligation of the contracts between appellant and respondent and are therefore invalid.

Having already, as we believe, conclusively shown that the rights of appellant in the streets of Boise City, for the purpose of laying and maintaining its water pipes, amount to contracts within the meaning of Article I, Section 10, of the Federal Constitution, it would seem to follow from the authorities already cited, that the ordinances in controversy, if carried out and enforced, as threatened and intended by the city, would impair the obligations of these contracts. We again call attention to the fact that it is practically conceded by the Court below in his opinion and by counsel for respondent on the argument, that if the water company has any contract rights in the use of the streets, the ordinance in controversy would amount to an impairment thereof. We will therefore only refer briefly to a few authorities on this point.

In *Planters Bank* v. *Sharp* 6, *How*, 301, the Court, at the bottom of page 327, said:

> "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In *Von Hoffman* v. *City of Quincy*, 4 *Wall.*, 552, the Court said:

> "The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden."

Walker v. *Whitehead*, 16 Wall., 314, 318.

In *Farrington* v. *Tennessee*, 95 U. S., 679, on page 683, the Court said:

> "The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this Court to redress the wrong."

In closing the discussion of this branch of the case, which we consider the most important one from the standpoint of both parties to this suit, we will most respectfully urge upon the Court the advisability of considering and deciding the nature of the water company's rights in the use of the streets of the city, and will call attention to some additional facts which render this course most desirable. Unless this question, which is of great public concern, is finally set at rest by this Court, the uncertainty and consequent contention arising out of the decision of the Circuit Court of Appeals, will continue, and will doubtless result in some further action on the part of the city, based upon the theory that the water company's rights are revocable licenses, thereby causing further litigation. No other than this Court has the authority, or having the authority, would feel justified in exercising it, to depart from that decision. There the jurisdiction of the Court was based upon diverse citizenship. Consequently that was the court of last resort and its decision is binding as to issues necessarily involved, and although we believe we have shown that the particular language of that opinion, under which the city seeks to justify its action, is not only *obiter dictum*, but does not correctly state the law applicable to this case, nevertheless, until that question is finally settled by this Court, neither the State nor inferior Federal Courts would feel disposed to depart in any respect from the rules announced in that case. We therefore submit that under the particular circumstances of this case, this is the most appropriate question for this Court to decide.

II.

The ordinances Exhibits "D" and "E," also violate the provisions of the Fourteenth Amendment that no State shall deprive any person or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, and also impair the obligation of the contract fixing rates to be charged for water.

These questions although raised in the bill and argued in the Court below, were deemed of secondary importance to the first question discussed, and were not referred to in the opinion of the Court below.

No critical analysis of the two ordinances in controversy, (Exhibits D and E), would seem to be necessary to show how arbitrarily they affect and discriminate against plaintiff and to what an unreasonable extent they interfere with the carrying on of its lawful business in using the streets for supplying water.

The State, through one of its political subdivisions, the municipality of Boise City imposed upon the water company the requirement of paying $300 per month for the privilege of continuing the same use of the streets which that company and its predecessors have enjoyed under their franchises, without this burden, for about seventeen years prior to the passage of those ordinances.

They were not passed by the city for any legitimate governmental purpose and are not claimed to rest upon the police power nor upon general authority to license or tax. They amount to nothing less than an unwarranted and unreasonable interference with the sacred right which is vested in this company, in common with all persons, natural and artificial, of enjoying its property and conducting a lawful business.

Within its sphere the legislative power of the city is abso-

lute, and it is clothed not only with the power of its own Mayor and police department, but also has behind it the entire executive power of the State, to enforce those ordinances, if they are upheld by the Court.

The action of the city, therefore, is the action of the State within the Fourteenth Amendment.

> *Ex parte Virginia*, 100 U. S., 339;
> *Chicago, Burlington, etc., Rd. Co.* v. *Chicago*, 166 U. S., 226, 234;
> *Yick Wo* v. *Hopkins*, 118 U. S., 356, 371,

where it was held that jurisdiction of the Court extends to determining the reasonableness and consequent validity of municipal ordinances and by-laws and whether they deny the equal protection of the laws. The Court held that the ordinances in that case were directed so exclusively against a class of persons as to require the conclusion that they amounted to a practical denial by the State of equal protection of the laws. It will be observed, however, that in the case at bar, ordinances, Exhibits D and E, are not even directed against a class of persons or corporations, but appellant is singled out specifically and is alone made the object of this hostile legislation, because, perchance, it is a corporation organized under the laws of West Virginia, or because it is claimed that it merely has a license for an indefinite period to lay and repair its pipes in the streets, which matters are emphasized in the ordinance Exhibit D; but in either case, the ordinances, under the decisions of this Court, amount, we contend, to a denial of the equal protection of the laws, and a taking of property without due process of laws. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150.

The recent decision of this Court in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 85, is also directly in point sustaining appellant's contention.

See also *Blake* v. *McClung*, 172 U. S., 239, which is also an authority on the point that the water company was within the jurisdiction of Idaho, within the meaning of the expression as used in the Fourteenth Amendment.

The principles announced by this Court in *Crowley* v. *Christenson*, 137 U. S., 86, 93-4, also support appellant's contention on this point. In that case an admittedly arbitrary and unreasonable ordinance imposing a license for the sale of intoxicating liquors was upheld, but only on the ground that liquor selling was not a harmless business and the distinction between that business and the laundry business passed upon in Yick Wo *v.* Hopkins, *supra*, was pointed out.

While it will be conceded that the selling of ardent spirits may be harmful, the same contention will not be made regarding the selling of pure, mountain water.

The malice behind the ordinances in controversy appears more clearly when the following facts disclosed by the record are considered.

May 11, 1905, the city and water company appointed commissioners, pursuant to Section 2711 of the Revised Statutes, as amended March 9th, 1905, which statute is set forth at page 11 of the Transcript, for the purpose of fixing rates to be charged by the water company for water for domestic and municipal purposes for the ensuing three years or until other rates are established.

This commission fixed a rate to be paid by the city for water for fire purposes and imposed a number of duties upon the water company to insure the best possible fire protection. This portion of the report of the commission is set forth in the Transcript at page 14 (Exhibit "F").

This schedule of rates went into effect August 1, 1905, and was accepted by both the city and the water company, and the latter has complied with every condition imposed (Tran-

script, pp. 4-5). The city paid the established rates for fire purposes until May, 1906, but has since refused to make any further payments to the company for water for this purpose, without assigning any reason except that it disclaims any liability to pay the rates fixed by the commission or any sum whatever for that purpose (Transcript, p. 8).

Apparently in retaliation for the amount fixed by the commission for water for fire purposes, the city in May and June, 1906, passed the ordinance requiring the water company to pay $300 a month for the use of the streets, threatening that unless that sum was paid, the city would remove the water company's pipes from the streets and its works from the city (Transcript, page 6). It is a significant fact that the amount fixed by the commission to be paid by the city for water for fire purposes amounts to $3,000 per annum and $3.50 per month for additional hydrants and the amount sought to be collected from the water company under the ordinance in controversy is $3,600 per annum, an amount sufficient to cover the charge for fire purposes. These facts indicate that the purpose of the city was to secure indirectly free water for fire purposes, regardless of the act of the Legislature repealing that clause, and in the face of its own action appointing commissioners under the statute and afterwards accepting and ratifying the established rates.

These facts, we contend, also establish a contractual relation between the water company and the city, to the effect that the rates fixed by the commission shall be the valid and binding rates during the period of three years mentioned in the statute and until new rates are established by commission, and that the city will pay these rates and that the water company will perform the duties required.

It would follow, therefore, that the imposition of the burden of $300 per month upon the company, which practically offsets the amount to be paid by the city for water for fire

purposes, seriously impairs, if it does not, in fact, entirely destroy this contract.

Many of the cases which we have already cited in discussing the first specification of error, also held that the ordinances under consideration not only impaired the obligations of the grants from the city, but were also obnoxious to the provisions of the Fourteenth Amendment before referred to. As an example of this, we will call attention to *Northwestern Telephone Co.* v. *Minneapolis, supra,* 81 Minn., 140, which involved an ordinance directing the placing of wires underground, and much of the reasoning of the Court applies to this case. The Court held that the ordinance was an arbitrary and unreasonable interference with the vested rights of the company and cited Yick Wo *v.* Hopkins, *supra,* 118 U. S., 356, and a large number of State and Federal authorities on the point, all of which apply with equal force to this case.

Believing that a further citation of authorities on this point is unnecessary, we submit that the Court below should have held that the ordinances in question, deny to appellant the equal protection of the laws, and amount to the taking of its property without due process of law, and also impair the contract arising out of the action of the commission in fixing the rates.

III.

An injunction should have been issued by the Court below restraining the city from enforcing the ordinances, Exhibits D and E, and from interfering with plaintiff's use, according to its franchises of the streets and alleys.

The bill, we contend, made out a proper case for the interposition of a Court of Equity. It shows that the city maintains and insists that the water company's right to use the

streets is a license only, which is subject to annulment and revocation at the will of the city, and that the city authorities have the right to compel the water company to discontinue the use of the streets and alleys, or to levy burdens and assessments for such use, at their pleasure, and that the city threatens and intends to impose further burdens and assessments on the water company for such use and to interfere with its use of the streets and alleys and has threatened to remove its pipes therefrom and its water works from the city (Transcript, pp. 5-6).

The bill also alleged as additional grounds of equity jurisduction, the unconstitutionality of the ordinance which the city was attempting to enforce; the monthly presentation of bills by the city to the company for the $300, threats of suit, the passage of the ordinance, Exhibit E, directing suit to be brought against the company the commencement of a suit, the presentation of another bill after the suit had been commenced, and that the city would continue to sue the water company, from time to time, for the amount of the alleged license tax, and that a multiplicity of suits would thereby result. It was also averred that the ordinances, Exhibits D and E, cast clouds upon the water company's franchises and depreciate the value of its property, impair its credit, embarrass its business and reduce its net revenue to an unfair and unjust extent which will amount to confiscation of its property; and, moreover, that the enforcement of those ordinances will destroy the water company's franchises and contract rights in violation of Article I, Section 10, of the Federal Constitution, and will deprive it of its property without due process of law, and deny it the equal protection of the laws (Transcript, pp. 6-7).

It is too well settled by the decisions of this Court to be now open to controversy, that such facts present a proper case for equity jurisdiction and for the issuance of an injunction.

Vicksburg Waterworks Co. v. *Vicksburg*, 185 U. S., 65, 82;

where the principle is clearly stated, and also in

Vicksburg v. *Waterworks Co.*, 202, U. S. 453;
Detroit v. *Detroit Citizens' Street Ry. Co.*, 184 U. S., 368, 378-81; see also
Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

It follows from these cases that if the ordinances which the city is seeking to enforce are in violation of the water company's contract rights or otherwise unconstitutional, an injunction against their enforcement is the proper remedy, and should have been granted by the Court below.

IV.

Plaintiff is entitled to a decree in the Court below that the rates as fixed by the commission for fire purposes are valid and binding on both the water company and city and also for the amount due from the city, for water for fire purposes, in accordance with the prayer of the bill.

The bill showed that rates were fixed by a commission duly appointed under Section 2711, Rev. St. of Idaho, as amended March 9, 1905, which statute is set forth in full on page 11 of Transcript, and that this commission fixed a schedule of rates to be charged by the company and paid by the city for water for fire purposes. That the report of the commission was adopted by the city and went into effect August 1, 1905, and that the water company has maintained the required fire pressure and complied with the report in all respects. That the amount due and unpaid by the city to the water company for water supplied for fire purposes, according to the rates fixed, amounted, at the time of filing the bill, to two thousand dollars (Transcript, pp. 4, 6). It was also alleged that the

city and its authorities disclaim any liability to pay the rates fixed by the commission or any sum whatever, for water for fire purposes, and that that part of the report of the commission fixing rates for fire purposes is void.

The bill prays that the reports of the commission as to these rates be adjudged to be binding on the city as well as the water company and that a decree be entered in favor of the company against the city for the amount due and unpaid.

Such a decree is appropriate and necessary in order to effect a complete determination of the controversy. It is in the nature of an accounting, where a money decree will be ordered, usually after reference to a master, as incidental to the main equitable relief. As an example of a decree by a Federal Circuit Court, in an analogous cause, we will refer to

> *Little Falls Elec. & Water Co.* v. *Little Falls*, 102 Fed. 663, 668,

which was a suit to enjoin the enforcement of ordinances alleged to impair contract obligations and recover from the city the amount due for water and light used by the city and which it refused to pay for.

After holding the ordinances invalid as impairing the franchises of the company, the Court, on page 668, decreed that unless counsel should stipulate the amount due, the case would be referred to a special master to compute such amount, and that complainant recover that amount from the city.

In *Anoka Water Works, etc., Co. v. City of Anoka*, 109 Fed., 580, 584, practically the same decree was rendered.

This Court has recognized the same principle in the following language, from

> *United States* v. *Union Pacific Railway*, 160 U. S., 1, 52:

> "These principles are abundantly sustained by the authorities. In 1 Pomeroy's Equity Jurisprudence, Sec. 181, many adjudged cases are cited in support of the proposition that if the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a Court of Equity would acquire, as it were, a partial cognizance of it, the Court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.' "

A large number of additional authorities to the same effect are cited in the recent edition of Prof. Pomeroy's work.

1 *Pomeroy Eq. Jurispr.* (3d Ed.) Sec. 181.

V.

Conclusion.

The affirmance of the decree of the Court below sustaining the demurrer would lead to certain unjust and unnecessary results to which we will briefly call attention.

It would not serve the purpose of sustaining any legal prerogative of the state or city in relation to their governmental or sovereign rights, but would unnecessarily weaken the doctrine of the freedom of franchises from impairment, as established by this Court.

The ordinances in controversy were unnecessary for the protection of any rights of the city or its inhabitants. The statutes of Idaho surround the city in this respect, with every protection possible. Exclusive and perpetual franchises and contracts for supplying water are forbidden. The city is free at any time to establish its own waterworks system or grant to others, franchises for that purpose. In the matter of rates to be charged for water for all purposes, it is fully protected by the statutes, and the record shows that

the rates were so fixed that appellant's net returns, after deducting necessary operating expenses, would only amount to six per cent. based upon the actual value of its plant at the time the rates were fixed.

The statute also gives the power to the city authorities to make reasonable rules and directions as to the mode and manner in which the company shall use its right of way within the city. It is difficult to conceive of any greater protection being afforded a community in the matter of its water supply.

To go further and hold, with the Court below, that the city has the right to revoke the water company's franchises, or impose any burdens it sees fit, under the name of licenses, taxes or assessments for the privilege of continuing its use of the streets, is so palpably in defiance of law, justice and reason, that we respectfully submit, such a result is impossible.

On the other hand, it would seem to be more compatible with the spirit of the Constitution and the decisions of this Court, to hold that the language of the Court of Appeals in the case between the same parties, upon which the Court below based its decision, should not be made to govern the facts of this case, but that the grants owned by the water company, having been accepted and complied with in good faith, cannot now be modified, repealed or taken away in the manner attempted by the city, without a violation of the provisions, before referred to, of the Federal Constitution.

All of which is respectfully submitted.

Dated, Boise, Idaho, December 29th, 1908.

RICHARD Z. JOHNSON,
EDGAR WILSON, and
RICHARD H. JOHNSON,
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 391.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Appellant

vs.

BOISE CITY.

Appeal from the Circuit Court of United States for the District of Idaho.

REPLY BRIEF OF APPELLANT.

This reply brief is served and filed in accordance with stipulation of counsel for both sides providing that appellant should serve its printed brief on counsel for appellee in time to give them opportunity to answer the argument of counsel for appellant, and that thereafter the latter might file a reply brief, if so advised.

Counsel for appellant desire to avail themselves of this stipulation to briefly answer certain new matters advanced by counsel for appellee.

In appellant's opening brief attention was called to the fact that only one question was considered in the court below (page 10, 14), which was, whether appellant's rights to use the streets were revocable at the pleasure of the city or not. This is also shown by the opinion of the court below (Trans. p. 27).

Counsel for appellee seek now to inject into the case certain new questions and discuss them for the first time in this Court.

The first of those questions, they are precluded from raising, not only on the ground that it was never raised below, but also because of the stipulation signed by counsel for appellee.

This point relates to the suit commenced by the city against this water company in the District Court of Ada County, Idaho, to collect various sums claimed to be due under the license ordinance. Appellee now claims, for the first time, that appellant had an adequate remedy at law in that action in the State Court. As stated, however, in our opening brief, page 8, that action was continued by order of the District Court of Ada County, Idaho, in accordance with stipulation of counsel, to await the final disposition of this suit.

This stipulation which was filed with the clerk of that court February 27, 1907, provides, after the title, as follows:

> "It is hereby stipulated by and between the counsel of record in the above-entitled cause that said cause shall be continued until such time as that certain cause now pending in the Circuit Court of the United States in and for the District of Idaho, Central Division, entitled, *The Boise Artesian Hot and Cold Water Company, Limited,* Plaintiff, vs. *Boise City,* Defendant, shall be finally disposed of."

It is dated February 26, 1907, and signed by the attorneys for the city and the water company.

A properly authenticated copy of the original stipulation is available for the Court if desired.

At the hearing of the demurrer, in the court below, and in accordance with this stipulation, the argument proceeded upon the one point relating to the rights of appellant in the use of appellee's streets. No further reference whatever was made to that suit in the State court, and, under the decisions of this Court, it cannot be raised here for the first time.

> Taylor on Juris. & Proc. of Sup. Ct. Sec. 426, where the decisions of this Court on the question are collected.

The principle is well settled in this Court that where the subject matter of the suit belongs to that class over which a court of equity has jurisdiction, the objection that the complainant has an adequate remedy at law, not made until the hearing in the appellate court, is too late, even though, if taken *in limine*, it might have been worthy of attention.

> *Reynes v. Dumont*, 130 U. S. 354, 395;
>
> *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 536;
>
> *Tyler v. Savage*, 143 U. S. 79, 97;
> *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 381.

As shown in appellant's opening brief (Sub. III page 59-61, and cases cited), the subject matter of this suit belongs to that class over which equity has jurisdiction, and it follows that appellee should be precluded from now raising this question, both by the stipulation, and the failure to raise it in the court below.

The next question raised by appellee was likewise never argued in the court below, nor was it raised by the demurrer, as counsel would have the court below believe.

That question is stated on page 10 of appellee's brief as follows:

> "Plaintiff's bill does not disclose that it, as a foreign corporation, has any authority to contract, operate or maintain a water system or transact business as such corporation within Boise City, Idaho."

The counsel also make the following statement:

> "The demurrer raises the question that plaintiff does not by its bill disclose that it, as a foreign corporation, has complied with the Constitution and laws of Idaho before it is authorized or empowered to contract, operate or carry on the business of furnishing water to the inhabitants of the city for compensation (Trans. page 10)."

We are compelled to take issue with this statement. Nothing whatever is stated in the demurrer about appellant's rights as a foreign corporation, or its compliance with the Constitution or laws of Idaho.

An examination of the demurrer (Trans. pp. 19-22) discloses the fact that the first and second paragraphs thereof relate to want of equity in the bill.

The third, fourth and fifth paragraphs present the question of the nature of the power or authority of plaintiff to supply water to the inhabitants of Boise City, and the wording clearly shows that the point raised under these paragraphs is that the water company had not been authorized by ordinance and had no contract with the city as is required of water corporations by Section 2710 of the Revised Statutes, but that it merely had a revocaable license, and, accordingly, this was the only point argued. The mat-

ter of whether or not the bill alleged that it had complied with the Constitution and laws of Idaho relating to foreign corporations was never mentioned or suggested in the court below, at any time. If it had been referred to, the court would doubtless have consented to an amendment of the bill setting up the true facts, which would have shown that appellant fully complied with the Constitution and statutes of Idaho, relating to foreign corporations, by filing its designation of B. S. Howe, of Boise, Ada County, Idaho, as its agent, in the office of the Secretary of State of Idaho and also in the office of the clerk of the District Court of the Third Judicial District of Idaho in and for Ada County, and designating Ada County as the County in which its principal place of business is conducted, on the 4th day of September, 1901, and that ever since the taking effect of the amendment of 1903, quoted on page 11 of appellee's brief, copies of its Articles of Incorporation, properly certified, as required by the statute, have been on file in the office of the Recorder of Ada County and in the office of the Secretary of State of Idaho.

The fact that the court below in his opinion makes no reference whatever to this question is sufficient evidence that it was not raised in that court.

This Court in *Dahl v. Montana Copper Co.*, 132 U. S. 264, held, that the objection that a corporation could not sue in the court below because it had not complied with a statute of Montana relating to foreign corporations doing business in the Territory cannot be urged for the first time in this court. Mr. Justice Field, in delivering the opinion of the Court said:

> "A failure to comply with the provisions of the law will not be presumed in the absence of any allegation on the subject. The objection cannot be urged for the first time in this Court."

If defendant desired to raise this question in the court below by demurrer, under the equity practice, it should have demurred specially, on the ground that plaintiff was not entitled to sue by reason of this disability, setting it forth specifically.

This class of demurrers to the relief, that plaintiff is not entitled to sue by reason of some disability is well recognized.

Redesdale (6th Am. Ed.) 131; 176-181.

1 Smith's Ch. Pr. 201, 202;

Story's Eq. Pl., Secs. 493-498.

The third point in the brief of appellee that "the appellant has no franchise or contract right to the use of the streets and alleys of Boise City," was argued by both sides before the court below and was the only question passed upon by that court.

It was to obtain a final determination of this question, which was of great public interest and much mooted since the decision of the Circuit Court of Appeals, that the suit was brought.

We believe that we have discussed this question sufficiently in the opening brief.

To the next point raised by appellee, we desire to call special attention. That is that "the bill of plaintiff's fails to disclose that its predecessors in interest ever secured permission from the city to assign or transfer to plaintiff, a foreign corporation, any privilege or license granted by said ordinances."

The record clearly shows that this question was not pleaded nor in any way brought to the attention of the court below.

The first case cited in appellee's brief on this point, on page 33, is "*Pullman Co. v. Transportation Co.*, 139 U. S. 1, 35 L. Ed. 55." This is doubtless an error in citation, as there is no such case at page 1 of 139 U. S. The case intended to be cited was probably *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24; 35 L. Ed. 55.

In *Pullman Co. v. Central Transportation Co.*, 139 U. S. 62; 35 L. Ed. 69, which related to the same lease of the Transportation Company's property and franchises claimed to be *ultra vires* in the above case cited by appellee, because the consent of the State was not obtained, this Court said:

> "In the present action, which was tried before the other was brought, the objection that the contract sued on was *ultra vires* was not pleaded, nor in any way brought to the notice of the court below. The defendant, therefore, is not entitled to avail itself of it upon this writ of error. *Bell v. Bruen*, 1 How. 69; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Klein v. Russell*, 19 Wall. 433; *Badger v. Ranlett*, 106 U. S. 255; *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468."

The justice of this rule in its application to the case at bar is obvious. Had this objection been seasonably presented, the water company, if the court held that it was necessary, might have shown many acts and proceedings on the part of the city, which amounted to complete permission and consent to the transfer. Appellant could also have shown in detail the express provisions in the corporate charters of the corporations which were its predecessors in interest showing that they were thereby expressly authorized to sell and convey all of their property and franchises, and

that their respective grantees were also expressly authorized to acquire them, thereby also showing authority from the State itself.

Many other considerations are involved in this question which render its complete determination impossible when raised in this Court for the first time.

We believe that the new questions advanced in appellee's brief are sufficiently answered herein.

Respectfully submitted,

EDGAR WILSON,
RICHARD Z. JOHNSON and
RICHARD H. JOHNSON,
Counsel.

Boise, Idaho, January 19, 1909.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 391.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, Appellant,

vs.

BOISE CITY.

Brief and Argument of Appellee.

Appeal from the Circuit Court of the United States for the District of Idaho.

Statement of the Case.

The plaintiff brings this action against the defendant praying for decree of the Court adjudging to be valid certain ordinances adopted by Boise City on October 3, 1889, July 10, 1890, and April 19, 1900, granting to the predecessor in interest of the plaintiff permission to lay and maintain water pipes in and along the streets and alleys of Boise City, and that the ordinance of June 7th, 1906, requiring plaintiff to pay a license-fee to said city for the privilege granted by the aforesaid ordinances be void, and all subsequent proceedings of the defendant based there on be held to be invalid, and that the defendant be restrained from enforcing said ordinance of June 7, 1906,

and further that the rates fixed and established by the water commissioners relating to the use of water by the defendant from plaintiff's water system be declared valid, and the recovery of $2,000.00, with interest for such use.

The complaint discloses that the plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of West Virginia; that it is the alleged successor in interest of the Artesian Hot and Cold Water Company, which was organized under the laws of the State of Idaho, and which undertook to transfer its property rights and privileges to the plaintiff. That on October 3, 1889, the defendant by an ordinance granted to H. B. Eastman and B. M. Eastman authority to lay and repair water pipes, along the streets and alleys of the defendant, for an indefinite period, which ordinance was accepted by the said Eastmans. And thereafter on March 28, 1891, transferred, together with their said water system to the Artesian Hot and Cold Water Company, Limited. That on July 10, 1890, the defendant passed an ordinance granting to the Artesian Water and Land Improvement Company the privilege of laying down and maintaing water pipes in the streets and alleys of the defendant for an unlimited period, which ordinance was also accepted and transferred by said last mentioned corporation on March 28, 1891, together with its property rights, to the said Artesian Hot and Cold Water Company, Limited. That on April 19, 1901, the defendant enacted another ordinance granting to the said Artesian Hot and Cold Water Company, Limited, permission to lay and maintain in the streets and alleys of the defendant and to supply water to said city and its inhabitants in the manner and according to the laws of the State of Idaho for an indefinite period,

which ordinance was not accepted by the said Artesian Hot and Cold Water Company. That on June 7, 1906, the defendant passed another ordinance requiring the plaintiff to pay a monthly license of $300.00 for the privilege granted by it to plaintiff and its predecessors in interest to lay and maintain water pipes in the streets and alleys of the defendant, and thereafter on December 13, 1906, said city commenced an action at law against the plaintiff in the District Court of the Third Judicial District of the State of Idaho, for Ada County, to collect the sum of $1,730.00, alleged to be due from the plaintiff to the defendant under said ordinance of June 7, 1906, which action is still pending.

This review of said ordinances adopted by the defendant, referred to in the bill, presents for consideration the controlling question as to whether or not said ordinances are valid, and the extent of the privileges granted by them.

The defendant filed its demurrer to the bill of the plaintiff, which was sustained by the trial court, presenting the following reasons as to why plaintiff is not entitled to any relief in a court of equity:

First. That the plaintiff has not in and by its bill stated such a case as entitles it to any relief in a court of equity, or to give jurisdiction to a court of equity.

Second. That the bill does not disclose that the plaintiff, as a foreign corporation, has any authority to contract, operate, or maintain a water system, or transact business as such corporation within Boise City, Idaho.

Third. That it does not appear from the bill that any term was fixed for the duration of the alleged privilege granted to the plaintiff or its predecessors in interest by said ordinances referred to in said bill to lay and main-

tain water pipes in Boise City, nor that there was or is now any contract between Boise City and the grantees of said alleged privileges, nor that the laws of Idaho fix any term for the duration of said alleged privilege, and that it does appear that the city has only granted by said ordinances a license revocable at will by it, and can require as a further continuation of said license the payment of a license fee for the use of its streets and alleys.

Fourth. That Sections 2710 and 2712 of the Revised Statutes of Idaho, relied upon by the plaintiff, do not operate to extend the privilege and license referred to in said ordinances for fifty years, or any definite period, as said statute is a limitation upon the power to contract, and not a provision of the contract.

Fifth. That it does not appear from the bill that the predecessor in interest of the plaintiff ever secured permission from the defendant to assign or transfer to the plaintiff, a foreign corporation, any privilege or license granted by said ordinances.

ARGUMENT.

The facts stated in the bill are insufficient to entitle plaintiff relief in or give jurisdiction to a court of equity.

An analysis of the bill will establish that there is not stated sufficient facts to entitle the plaintiff relief in, or give jurisdiction to a court of equity, as under the allegations of the bill the plaintiff has an adequate remedy at law. It is apparent from the bill that the plaintiff's sole object is to secure a decree of the Court declaring the aforesaid ordinances to be franchises for a period of fifty years; that the ordinance of June 7, 1906, requiring the plaintiff to pay a license fee be declared void for a recov-

ery of $2,000.00, with interest, for the use of water from its system, and the rates established by the water commission, relating to said use be valid. That there is pending an action at law in the State Court of Idaho, brought by the defendant against the plaintiff for the recovery of $1,730.00, alleged to be due as such license fee. The prayer of the bill taken in connection with the alleged facts clearly discloses that this is the only relief prayed for. Then we contend that in the action at law, now pending for the recovery of said license fee, the plaintiff can certainly present to the Court the question as to the validity of said ordinance of June 7, 1906, and whether the ordinances, under which it claims to have the right to the use of the streets of the defendant are franchises for a term of fifty years. The plaintiff could, in said action at law, either set up its claim for $2,000.00 as a counter claim in the event the Court held the license fee valid, or institute an independent action in a court of law for the recovery of said amount, as the city, under the allegations of the bill seem to be solvent.

The universal rule recognized by the text writers and Courts of this country is, that where the relief prayed for is such as a court of law is competent to grant, a court of equity has no jurisdiction. We find this principle embraced in the statutes of the United States, which reads:

"Suits in equity shall not be sustained in either of the Courts of the Unitel States, in any case where a plain, adequate and complete remedy may be had at law."

1 Stat. at L. 82; Rvs. Stat. Sec. 723.

This Court has on numerous occasions said:

"Wherever a court of law is competent to take cog-

nizance of a right and has power to proceed to a judgment, which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Hipp vs. Babin, 19 How. 271; 15 L. Ed. 633.
Fussell vs. Gregg, 113 U. S. 550; 28 L. Ed. 298.

"Where a party has a good defense at law to a purely legal demand he can not resort to a court of equity for relief."

Phoenix Mut. L. Ins. Co. vs. Bailey, 13 Wall, 616; 20 L. Ed. 501.

In the case below the city of Memphis entered into a contract with the Memphis Water Company, whereby, amongst other things, the water company agreed to erect water works in the city, including a number of street hydrants, which the city agreed to pay therefor a certain annual rent. The main object of the bill was to have declared valid said contract and compel the city to pay the rents due under it. One of the principal defenses set up by the city was the illegality of the contract, and that there was a complete and adequate remedy at law. Speaking of this general rule, this Court said:

"The view we have taken with regard to the propriety of the proceeding in this case, for enforcing the contract against the city, renders it unnecessary to determine the question raised on the assignment of it by a citizen of Tennessee. Whether the contract is or is not a valid one, and, if valid, what are the objections of the city under it and the damages for the breach thereof, are purely questions

of law, which the city can not, under ordinary circumstances, be compelled to litigate with any other party than the water company, or its legal assigns. * * * Recurring for a moment to the legal facts, How does the case really stand? The trustees of the mortgage on default of the water company in payment of interest took possession of its works and carried them on. In performing this duty they found, or supposed they had found, that certain interests had accrued, and were accruing from the city for the use of the hydrants, under the contract in question, which rents the city refused to pay. To establish the contract and recover these rents, their remedy was clear and adequate by an action at law in the name of the water company. They brought such an action and failed by the adverse decision of the Supreme Court of Tennessee. Then the bondholders, dissatisfied with the result, brought this suit in equity in the Federal Court for the purpose of raising the same questions anew. It is difficult to see how they acquired any right to transfer the controversy from a court of law to a court of equity. The fact that they have only a beneficiary interest is not of itself sufficient. Whether the legal interest in the contract remained in the water company or became vested in the trustees, an action at law could have been brought in the name of the parties having it."

New York Guaranty Co. et al. vs. Memphis Water Company, 107 U. S. 205; 27 L. Ed. 484-487.

It appears from the bill in this case that the plaintiff is seeking to restrain the defendant from proceeding with an action at law in the Idaho State Court, brought to recover a certain sum alleged to be due as a license fee under the ordinance of June 7, 1906.

In such a case a Circuit Court of the United States will not interfere to enjoin a pending suit at law.

Hapgood vs. Hewitt, 119 U. S. 234; 30 L. Ed. 369.

Buzard et al. vs. Houston, 119 U. S. 351; 30 L. Ed. 451.

Mr. High, in his work on injunctions, says:

"The most frequent ground for refusing relief by injunction against a suit at law is that the defense urged may be used in an action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds which the person aggrieved may avail himself of the defense of the action at law."

High on Injunc. Vol 1, 3 Ed. Secs. 89-93.

It seems quite clear from the statements of the bill that the appellant can present its alleged defense in the suit at law, pending in the Idaho State Court, brought by the city upon the ordinance of June 7, 1906, for the recovery of said license fee, as it is alleged this ordinance was enacted by the city without authority of law, and is invalid. This question can certainly be determined by the Court in that case, and, if well taken, it would be a complete defense in said action at law.

It seemed from the argument upon the demurrer by counsel for appellant in the Court below, that the reasons why a court of equity should assume jurisdiction and grant the injunction prayed for in plaintiff's bill, are that the ordinance of June 7, 1906, is unconstitutional; that the ordinance Exhibit E directing suit to be brought against appellant for said license fee will cause a multi-

plicity of suits; that said ordinances Exhibits D and E cast clouds upon appellant's franchises, impair its credit, embarass its business and reduce its revenue to an unjust extent, which will amount to confiscation of its property; that in the enforcement of these ordinances it will destory appellant's franchises and contract rights, and that the city has threatened to interfere with appellant's use of the streets and alleys. As heretofore stated in this brief it will be noticed that the main object in bringing this action is to prevent the city from enforcing said ordinance of June 7, 1906. The contention made by appellant that the city intends to interfere with its use of the streets and alleys is answered by its allegation that the city has proceeded in an action at law in the Idaho State Court to recover the sum of $1,730.00, due it under said ordinance of June 7, 1906. It is not reasonable to conclude that while the city is attempting to collect said license fee, it will at the same time interfere with appellant when in using its streets and alleys.

For the averments in plaintiff's bill that the city is asking the Court to require the water company to pay said license fee refutes the allegation in its bill that it intends to remove the water company's pipes from its streets. This question as to the constitutionality of said ordinance of June 7, 1906, requires a consideration of the question as to whether said ordinances under which appellant contends to have contractual rights to the use of the streets and alleys of the city can be determined in the action at law, now pending in the State Court of Idaho.

Plaintiff's bill does not disclose that it, as a foreign corporation, has any authority to contract, operate or maintain a water system or transact business as such corporation within Boise City, Idaho.

The demurrer of the defendant raises the question that plaintiff does not, by its bill, disclose that it, as a foreign corporation, has complied with the Constitution and laws of Idaho before it is authorized or empowered to contract, operate or carry on the business of furnishing water to the inhabitants of the city for compensation (Tran. p. 20).

The Constitution of Idaho, adopted August 6, 1889, and ratified the 1st of November, 1889, in this connection provides: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served, and no company or corporation formed under the laws of any other country, State, or Territory, shall have or be allowed to exercise or enjoy, within this State, any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this State."

Constitution of Idaho, Art. 11, Sec. 10.

The statutes of Idaho to which we refer and which have been the law of Idaho since 1887, as amended, reads as follows:

"Section 2653. Every corporation not created under the laws of this Territory, doing business in this Territory, must, within three months after the passage of this title, or from the time of commencement to do business in this Territory, designate some person residing in the county in which the principal place of business of such corpora-

tion, in this Territory, is conducted, upon whom process issued by authority of, or under any law of this Territory, may be served, and within the time aforesaid, must file such designation in the office of the Secretary of the Territory, and in the office of the Clerk of the District Court for such county, and a copy of such designation certified by either of said officers must be evidence of such appointment; and it is lawful to serve on such person, so designated, any process issued as aforesaid, and such service must be deemed a valid service thereof.

"Every such corporation which fails to comply with the provisions of this section shall be denied the benefit of the Statutes of this Territory limiting the time of the commencement of civil actions, and any limitations in such Statutes shall only run in favor of any such corporation during such time as shall be within the Territory such person duly designated as aforesaid, upon whom such service can be made: *Provided, further,* That such foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of this Territory applicable to like domestic corporations."

The above Statute was, on the 10th day of March, 1903, amended by the Legislature of the State of Idaho, which amendment reads as follows:

"Section 1. That Section 2653 of the Revised Statutes of Idaho be amended to read as follows:

"Section 2653. Every corporation not created under the laws of this State must before doing business in this State, and every such corporation now doing business in this State, must within three months after the taking effect of this act, file with the County Recorder of the county in

this State, in which is designated its principle place of business in this State, a copy of the articles of incorporation of said corporation duly certified to by the Secretary of the State of the State in which said corporation was organized, and a copy of such articles of incorporation duly certified by such County Recorder, with the Secretary of the State, paying to the latter the same fees as are provided by law to be paid for filing original articles of incorporation, and must within three months after the passage of this act, or from the time of commencement to do business in this State, designate some person in the county in which the principal place of business of such corporation in the State is conducted upon whom process issue by authority of or under any law of this State, may be served, and within the time aforesaid must file such designation in the office of the Secretary of State, and in the office of the Clerk of District Court for such county, and a copy of such designation certified by either of said officers, must be evidence of such appointment; and it is lawful to serve on such persons so designated any process issued as aforesaid, and such service must be deemed a valid service thereof, such notice and designation of agent on whom process may be served shall run from the time of filing same, as herein provided, until his successor is appointed by such filing, or said office becomes vacant by resignation filed by such agent, in the office in which his appointment is filed, or by his death, or removal from such county, and in case of such vacancy said corporation shall within sixty days thereafter refill said office as herein provided. No contract or agreement made in the name of, or for the use or benefit of such corporation prior to the making of such filings as first herein provided can be sued upon, or be enforced in any court of

this State by such corporation, and such corporation can not take or hold title to any realty within this State prior to making such filings, and any pretended deed or conveyance of real estate to such corporation prior to such filings shall be absolutely null and void; and any and all officers, agents and representatives of said corporation, or persons claiming to be officers or agents of the same, who shall make or attempt to make any contract or agreement or contract any indebtedness in the name of such corporation, or for its use or benefit, before such original filings are made, or while such corporation is in default upon filing a reappointment as hereby provided, shall be jointly and severally personally liable upon and for all such contracts and agreements as principal contractors.

"Every such corporation which fails to comply with the provisions of this section shall be denied the benefit of the Statutes of the State limiting the time of the commencement of civil action and any limitations in such Statutes shall only run in favor of any such corporation during such time as shall be within the State such person duly designated, as aforesaid, upon whom such service can be made: *Provided, further,* That such foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain and shall be subject to the laws of the State applicable to like domestic corporations."

Session Laws of Idaho, 1903, 49.

The Supreme Court of the State of Idaho has, on several occasions, interpreted the above provisions of our Constitution and Statutes and has held that under the laws of this State a foreign corporation, in order to maintain an

action in the Courts of this State must allege a compliance with the Constitution and Statutes of the State in regard to designating an agent, upon whom service of process may be had, and filing its articles of incorporation and complying with the other requirements of the Constitution and Statutes of the State before it can maintain a suit for breach or violation of any contract entered into between said corporation and others.

Smith vs. Alberta and British Columbia Exploration and Reclamation Co. 9 Ida. 399; 74 Pac. 1071.

Katz vs. Herrick, 12 Ida. 1; 86 Pac. 873.

The Federal Courts have laid down the rule that they will accept the interpretation by a State Court of the Constitution and Statutes of the State, yet, we find that this Court has construed provisions of this kind of State Statutes to the effect that before a foreign corporation can transact business within a State, or maintain an action upon any contract, it must first comply with the requirements of the State Constitution and Statutes.

In the case below it was said:

"The State of California has the power to exclude foreign insurance companies altogether from her territory. * * * She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation. * * * The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State

which may be directly or indirectly requisite in order to render the enforcement of the conceded powers efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

Hooper vs. California, 155 U. S. 648; 39 L. Ed. 297.
Fritts vs. Palmer, 132 U. S. 282; 33 L. Ed. 317.
Wilson vs. Seligman, 144 U. S. 41; 36 L. Ed. 338.
Baltimore & Ohio Co. vs. Harris, 12 Wall. 65; 20 L. Ed. 354.
Waters-Pierce Oil Co. vs. State of Texas, 177 U. S. 28; 44 L. Ed. 657.
Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727; 28 L. Ed. 1137.
Pembina Consolidated Silver Mining & Milling Co. vs. Pennsylvania, 125 U. S. 181; 31 L. Ed. 650.
Ducat vs. Chicago, 10 Wall. 410; 19 L. Ed. 972.

In the case of Fritts vs. Palmer, *supra,* this Court again laid down the rule that, "It may be assumed, therefore, that the Comstock Mining Company, being a corporation of another State, had no right to do business in the State of Colorado, until after it had one or more known places of business within its limits, and an authorized agent designated, upon whom process could be served, nor until it had made and filed in the proper office the certificate prescribed by Section 260 of the Statute relating to foreign corporation."

This principle of law, that a State may prescribe the terms and conditions upon which a foreign corporation shall be allowed to carry on its business within the State is clearly recognized by this Court in the cases above cited.

Upon an examination of the bill of the plaintiff in this

action, it will be noticed that there is no allegation that the plaintiff has ever, at any time, complied with the requirements of the Constitution and laws of the State of Idaho. Therefore, we invoke the rule above stated that it must affirmatively appear by the plaintiff's bill that it has complied with the requirements of the Constitution and laws of the State before they can maintain this action.

The Appellant Has No Franchise or Contract Right to the Use of the Streets and Alleys of Boise City.

We presume that it will not be disputed that before a person or corporation can acquire the right to occupy and use the highways of a city, such right must be granted by either an act of the Legislature or the mayor and council of the city. That whatever rights the appellant has to the use of the streets and alleys of Boise City must come from the ordinances, Exhibits "A," "B" and "C." It will be observed from a reading of the ordinances of October 3, 1889, July 10, 1890, and April 19, 1900, Exhibits "A," "B" and "C" relied upon by the appellant as granting to it the right to the use of the streets and alleys of the city, no term was fixed for the duration of the privilege. That they do not possess any element of a franchise or a contract, but are merely licenses subject to the requirement by the city as a further continuation thereof to the payment of a license fee for the use of the streets and alleys. They certainly do not contract with appellant or its predecessors in interest that they can occupy and use the streets and alleys of the city for a definite or fixed period. Before entering upon a discussion of the proposition as to whether or not the appellant under these ordinances has a franchise or contract right to the use of the highways of Boise City

for a period of fifty years, we invoke, in the first place, the rule that they take nothing in the way of a grant, franchise or contract by intent or implication. They must show by clear and express terms of the grant, franchise or contract that this right or privilege to the use of the streets and alleys is expressly given in said ordinances, for all that is not expressly and especially given is presumed against the company and in favor of the city or State. This rule of law is now elementary.

In the case below the question involved was the validity of a provision against the grant in the charter of a corporation to do certain things, it was said: "The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Northwestern Fertilizing Co. vs. Hyde Park, 93 U. S. 659; 24 L. Ed. 1036.

This rule has been invoked, of course, a great many times and applied to a multitude of charters and grants, and we simply give a few of the authorities and references, which may be of interest in the further investigation of this subject.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116; 51 L. Ed. 399.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22; 50 L. Ed. 353.

Slidell vs. Grandjean, 111 U. S. 412; 28 L. Ed. 321.
Coosaw Mining Co. vs. South Carolina, 144 U. S. 550; 36 L. Ed. 537.
Pearsall vs. G. M. Ry. Co. 40 L. Ed. 838; 161 U. S. 646.
Clark & Marshall on Corps. Vol. 2, pp. 983-985.
Phoenix Inst. Co. vs. State, 40 L. Ed. 660; 161 U. S. 174.
Covington vs. Sanford, 41 L. Ed. 566; 164 U. S. 578.
Hoge vs. Railway Co., 25 L. Ed. 303; 99 U. S. 348.
Bank of Commerce vs. Tenn. 26 L. Ed. 810; 104 U. S. 493.
Syracuse Water Co. vs. City, 116 N. Y. 167.

Viewing the ordinances of October 3, 1889, July 10, 1890, and April 19, 1900, in the light of these decisions, it is clear that they can avail the appellant nothing in this action in their contention that said ordinances under the laws of the State of Idaho grant a franchise or contract right for the period of fifty years to the use of the streets and alleys of the city, and that the Court below was entirely correct in holding that under said ordinances and the laws of Idaho, all that appellant and its predecessors in interest had, was a mere license, subject to a requirement by the city to the payment of a license fee for a continuation of the use of the streets and alleys. We repeat that these ordinances are wholly silent upon the subject of the right of the appellant to use and occupy the streets and alleys of the city for any definite period. They simply give appellant the right to lay and maintain water pipes in the streets and alleys of the city for no limited time. All other matter relative to the period which appellant can continue occupying

and using said streets and alleys, and the payment of a license or compensation to the city for the use of its streets and alleys, are open to future contract and future legislation by the city. These ordinances do not in any way inhibit or contract against future legislation on the part of the city, and whether the privileges under these ordinances were in the hands of the Eastmans, or their successors, the corporation, they were subject to such obligations, charges, license and duties as the city might reasonably impose. And the duty here imposed by the ordinance of June 7, 1906, is one which the Courts has held proper and reasonable under the conditions which appellant is occupying and using the streets and alleys of the city, there being nothing in the nature of a contract or franchise in these ordinances against the city requiring the payment of a license fee for a continuation of the use of its streets and alleys. The appellant and its predecessors in interest entered upon the occupancy and use of the streets and alleys subject to a license which the city might impose upon it. There is nothing in these ordinances or elsewhere, to prevent the council of the city from requiring the appellant to pay such license. The appellant and its predecessor in interest have seen fit to engage in a business by entering upon the streets and alleys of the city under said ordinances, which do not contain any definite term, or the payment of any compensation to the city for the use of its streets and alleys. They elected to go into business under such ordinances, and when they did so they placed themselves in a position where they could not complain of the requirement of the city to pay a license fee for the use of its streets and alleys. What we say is that when the water company, for instance, is organized for the purpose of sup-

plying the inhabitants of the city with water and entered upon the streets and alleys of the city under the ordinances, which fail to contain any element of a contract or franchise exempting it from a payment of a license fee for the use of said streets and alleys, such corporation organized and conducting its business under such conditions is subject to such requirements as is imposed by said ordinance of June 7, 1906.

The ordinance of October 3, 1889, Exhibit "A," was in an action at law between the appellant and the city construed by the Circuit Court of Appeals for the Ninth Cirsuit. The Court said:

"The plaintiff in error contends that the Statute of 1887 confers upon the City of Boise no right to take water free from it or its predecessor, for the reason that they were protected by the franchise given to the Eastmans. There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the State. * * * But had the Eastmans such a contract with the city as to come within the rule just cited? The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at will of the grantor, or, by its acceptance on the part of the grantee,

it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. * * * From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own water works, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

Boise City Artesian Hot & Cold Water Company vs. Boise City, 123 Fed. 232.

President, etc. of Colby University vs. Village of Canandaiqua, 96 Fed. 449.

It will be conceded, we presume, that the ordinances of July 10, 1890, and April 19, 1900, Exhibits "B" and "C" are not in substance distinguishable from the Eastmans ordinance of October 3, 1889, so far as the express language is concerned.

It was contended by counsel for appellant in the Court below that the case of the President, etc. Colby University vs. The Village of Canandaigua, 96 Fed. 449, cited by Judge Gilbert in the above case does not sustain his opinion. One of the questions presented and decided by the Court in the Village of Canadaigua case was whether or not there was a franchise or license granted by the city. It does appear that the village authorities only permitted the corporation to lay its pipes in the village streets and the question arose as to whether or not the corporation had a

franchise which would preclude the village from constructing a water system of its own, without taking by purchase or condemnation the property of the corporation. And the Court held: "No canon of construction is familiar to the Court which transforms plain and unambiguous language permitting an act to be done into a positive command to do the act. So far as the written law is concerned there can be little doubt that villages in this State may build and own their own water supply notwithstanding the fact that private corporations are in the field, provided the village authorities have done nothing more than permit the corporation to lay its pipes in the village streets. In the present instance the village simply granted a naked permission to do this to the company. It was a license, and nothing more."

This decision of Judge Gilbert's, which is based upon sound reason and decisive of this proposition, was treated by counsel for appellant at the argument in the Court below to be merely *dictum*, and should have no weight whatever in this Court when in deciding the case at bar. It was also contended that Sections 2710 and 2712 of the Revised Statutes of Idaho, 1887, were overlooked by the Court. That ordinance, Exhibit B (Tran. p. 10) was not considered by the Court. That where a license is granted, although for an indefinite period and on the faith of which the grantee has made expenditures, the city is estopped from requiring the grantee to pay for the use of its streets and alleys. Under these contentions we are called upon to consider, first, an analysis of the decision of Judge Gilbert, for the purpose of ascertaining what were the questions presented to the Court in that case. It will be no-

ticed that the bill of the water company in that case disclosed that the city had no right to the use of water free from its pipes for sprinkling purposes, because the ordinance of October 3, 1889, Exhibit A, known as the Eastman ordinance, granted to the water company a *franchise*. The answer of the city in that case, among other things, made denial of this allegation, thereby presenting to the Court as one of the questions as to whether or not the Eastmans ordinance was a grant or a *franchise*. It is evident from a reading of Sections 2710 and 2712 of the Revised Statutes of Idaho, 1887, the Court did not overlook nor deem them applicable when in deciding that case, for said Section 2710 does not purport to prescribe what a grant or contract made by the city shall contain. As was very logically said by the Court below, when in deciding this case, that:

"The plaintiff contends that while the ordinance of July 10, 1890 (Exhibit B), is not in substance distinguishable from the Eastman ordinance of October 3, 1889, so far as the express language is concerned, still in as much as Exhibit B runs to a corporation, the Court in construing it should read into it a clause providing that the privilege granted shall continue for fifty years, because of Section 2710, Revised Statutes of Idaho, which reads as follows:

" 'No corporation formed to supply any city or town must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract ente. into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rate for water, nor must any exclusive right

be granted. No contract or grant must be made for a term exceeding fifty years.'

"In other words, in the absence of language in the ordinance defining the term, this Statute operates to extend the grant for a maximum period, which could have been legally specified.

"Possibly influenced in a measure by the representations made in the bill that the defendant is disposed to deal unjustly with the plaintiff, and the earnest appeal of counsel for protection against impending confiscation of the plaintiff's property, I have given sympathetic consideration to this contention, hoping that thereby, without destroying the integrity of the law, the relations between the parties might be so defined that neither would be able to do grave injustice to the other, but I have been unable to accept the construction as either a natural or a probable one. The statutory provision relied upon does not purport to define or prescribe what the contract or grant shall contain but what it shall not contain. It is a limitation upon the power to contract, not a provision of the contract. It is not mandatory, but prohibitive. If it provided that in the absence of express agreements the term should be fifty years, then it would naturally take its place in every contract or grant silent as to the term. Suppose that the language were, 'No contract or grant must be made for a term less than five years or more than fifty years,' what would be the term of a grant like that under consideration? Would there be any more reason to presume the maximum than the minimum? Upon the other hand, by the familiar rule that public grants susceptible of two constructions must receive the one most favorable to the public, would

we not be compelled to adopt the minimum? No substantial distinction can be made between the hypothetical Statute and the provision under consideration; in both cases the maximum is fifty years; in the one the minimum is a grant for five years, in the other a grant revocable at will" (Tran. pp 28-29).

It is clear to the mind that the said Section 2710 does not extend the period of time to fifty years, in which the water company can occupy and use the streets and alleys of the city, but expressly provides a limitation upon the city authorities, when in contracting with the water company, as this Statute reads: *"No contract or grant must be made for a term exceeding fifty years."* It certainly can not be contended that the water company could enter upon and use the streets and alleys of the city, without first obtaining a franchise or contract from the city under this provision of our Statute. Then, if that be true, the city has the undoubted right when in granting such franchise or contract to prescribe the period of time, or limit the life of such franchise or contract, and when in doing so, this Statute merely places a limitation upon the power given to the council of the city, when in granting such franchise or contract.

In the case below the Court had before it the consideration of a Statute of the State of Ohio, which provided: "That no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal." The Court said: "The general law gives authority to the council to consent to the use of the city's streets for street railroads, and, as we have seen

it was not until 1878 that a proviso was added to the effect that no grant or renewal (that is to say, no grant or renewal under Sections 2501 and 2502,) should be valid for more than twenty-five years. This proviso is a limitation upon the plenary power, theretofore given by the State to the council, and no more is to be substracted, in consequence of that proviso, from that plenary power thus delegated than its express terms permit."

Cleveland Electric R. Co. vs. City of Cleveland, 137 Fed. 111-129.

Under the charter of Boise City the Legislature of this State has granted to it full control of its streets and alleys. We quote the portions of the charter of the city, with reference to this authority:

"To provide the city with good and wholesome water, and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor." (Subdivision 9 of Section 5.) And further: "The roads, streets and alleys within said city limits shall be under the exclusive control of said common council, who shall make all needful rules in relation to the improvement, repair, grading, cleaning, etc., of the same, and said city shall not be included in any road district in said county." (Section 10, approved January 11, 1866.) And further: "To provide the city with good and wholesome water, by contract or otherwise and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor." (Subdivision 9, Section 5, approved March 12, 1897.) And

further: "To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers and the erection of electric, gas and other lights." (Approved March 14, 1901.)

We then invoke the admitted rule, that where a municipality has the power to give or refuse consent to the occupation and use of its streets for any purposes, it may impose terms and conditions, including a time limit; and an acceptance of a grant carries with it all the conditions and limitations upon which it is based.

Chicago Terminal Transfer R. Co. vs. Chicago, 203 Ill. 576; 68 N. E. 99.

Detroit vs. Ft. Wayne and B. I. R. Co. 95 Mich. 456; 54 N. W. 958.

Allagheny vs. Millville E. & S. R. Co. 159 Pa. 411; 28 Atl. 202.

City of Indianapolis vs. Consumers Gas L. Co. 140 Ind. 107; 39 N. E. 433.

This principle which we are contending for as to the power of the city to limit the tenure of a grant or privilege to occupy its streets is clearly recognized in the case below when in construing a Statute limiting the city to a period of twenty years in granting a privilege to the use of its streets, the Court said: "The city being the source of the grant, not merely a consentor to it, the terms and duration of the grant to that end were prerogatives of the city, delegated by the State, and the gas company was powerless, equally with any individual to exact terms or privileges. It could only accept or refuse such terms as were tendered. * * * Thus in fixing by this ordinance the tenure

during which the grantee was permitted to occupy the streets with its pipes and served the inhabitants with natural gas, it was within the power of the city to limit the tenure, either to a definite number of years, or to terminate after a given period at the option of the city, as was in effect provided by Section 18."

In the concurring opinion of Judge Grosscup, it is said: "The sole right of the company to enter upon the streets of Indianapolis, was under a grant from the City of Indianapolis. Under the laws of Indiana, the city is not simply a consentor—the city is the source of the grant; and being the source of the grant had the right to impose upon the grant, as to tenure, as well as to other terms and conditions, just such limitations as it deemed wise."

City of Indianapolis vs. Consumers' Gas Trust Co. 144 Fed. 640-44-48.

Sullivan vs. Bailey (Mich.), 83 N. W. 996.

City of Houston vs. Houston City Street Ry. Co. 19 S. W. 127.

It should be borne in mind, that there is a distinction between grants conferred by the State and obtained by organization under the State law, and those contractional grants not given by the State but which come from the local authorities having the right to grant the use of a city highway. This principle of law is too well settled in this country as to now be open for discussion. The cases holding that the life of a franchise not containing a fixed period granted by the Legislature is the period fixed for the life of the corporation, are not grants given by municipalities.

"The argument that, because the State had imposed no limitation upon the duration of the corporate franchises of this company, therefore the term for which it held its street grants was likewise intended to be unlimited, is illogical. It loses sight of the distinction between those franchises conferred by the State and obtained by organization under the State law and those property or contractual franchises not granted by the State, and not inherent in the corporation as such, but which come from the local authority having the right to grant the right to occupy a public highway."

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296-308.

This doctrine is approved by this Court in the case below.

Blair vs. City of Chicago, 201 U. S. 400; 50 L. Ed. 801.

We find that appellant contends that Section 2712 of the Revised Statutes of Idaho, 1887, also extends the duration of the period under said ordinances to fifty years. After a careful reading of this section we are unable to discover how it sustains such a contention. It merely provides that any corporation after having been *authorized* by an ordinance of or contract with the city as stated in Section 2710 may use so much of the streets so authorized and in the manner and under the direction of the city authorities. There must certainly be a contract or ordinance specifying the elements of a contract before this section should be considered in granting to the water company a right to the use of the streets of the city.

. .

We urge, therefore, that the Court below was entirely correct in holding that these ordinances did not grant to appellant a franchise or contract right to the use of the streets of the city for any specified term, and that said ordinances granted to appellant only a license subject to the payment of a license fee for the privilege of occupying and using the streets and alleys of the city.

At the argument in the Court below appellant contended that after making certain expenditures in the way of laying its pipes, etc., in the streets and alleys of the city the doctrine of equitable estoppel applies against the city when in either interfering with the use, or requiring the payment of compensation for the use of its streets. Had the water company in this case a contract with the city for the use of its streets for a definite period of time possessing the elements of a contract, then this equitable rule would no doubt apply. The authorities relied upon by appellant are where there was an *express agreement* for a *limited* period of time, and not a license. The universal rule in this regard is that there must be a contract entered into with the city which it had authority to make, before the doctrine of equitable estoppel applies against the city when in requiring a corporation occupying its streets to pay for the use thereof. To illustrate, supposing that our contention be correct that there is no franchise or contract between the water company and the city for the use of the streets and alleys for a definite period of time, then what would be the limit of time in which the water company could occupy the streets? The water company's answer is that after it has made expenditures in laying its pipes in the streets, the city is estopped from imposing a

condition requiring it to pay for such use. Then if this be true the company could use said streets for an unlimited period of time which would create a use in perpetuity not recognized by the laws of Idaho and the modern decisions of the Courts. The whole question resolves itself to the inquiry, Has the water company any franchise or contract with the city for the use of the streets? We say no, it is now and has only occupied the streets by sufferance. If not, there certainly can not be any legal or equitable objection to the city requiring the company to pay for the use of its streets and alleys.

Louisville Trust Co. vs. City of Cincinnati, 73 Fed. 716.

It will be noticed from plaintiff's bill that its predecessor in interest voluntarily went to the city and asked for the privilege and license granted by said ordinances, Exhibits "A," "B" and "C," and that the city only, by the term thereof, granted permission to lay water pipes in its streets and alleys for an indefinite period. There was no contract made between them, nor has the appellant or its predecessors in interest ever at any time paid the city in any way for the use of its streets and alleys, which they have been using free of charge for a long time, and have and now claim the right to compensation for water furnished to the city for certain municipal purposes. It makes the request that it should receive compensation for the water furnished to the city and at the same time be permitted to use the streets and alleys free of charge.

This plea of appellant's that if it is required to pay for the use of the streets and alleys of the city under said

ordinace of June 7, 1906, Exhibit "D," would bring hardship to it, although it appears to be furnishing water at a profit to the inhabitants of a city of 25,000 and also charging the city for water, is sufficiently answered in the cases cited below, in which the correct doctrine is stated that, "But such considerations can not control the determination of the rights of the parties."

Hamilton Gas & Coke Co. vs. City of Hamilton, 146 U. S. 252; 36 L. Ed. 961-8.

Knoxville Water Co. vs. Knoxville, *supra.*

Curtis vs. Whitney, 13 Wall. 68-70; 20 L. Ed. 513.

President, etc. of Colby University vs. Village of Canandiagua, *supra.*

The bill of plaintiff's fails to disclose that its predecessors in interest ever secured permission from the city to assign or transfer to plaintiff, a foreign corporation, any privilege or license granted by said ordinances.

We contend that the Artesian Hot and Cold Water Company of Idaho, being a mere creature of the law, had no authority without consent of the city to transfer any privilege or license it may have had to the appellant, a West Virginia corporation, and thus authorize a stranger to the city to come into the city and exercise this privilege or license; that the plaintiff company has not plead sufficient facts to enable it to exercise this privilege or license. It having failed, as heretofore stated in this brief, to disclose by its bill any authority under the law to contract, transact business, or bring an action, and that its pretended purchase of the Idaho company's privilege and license was void.

Pullman Co. vs. Transportation Co. 139 U. S. 1; 35 L. Ed. 55.

Thomas vs. West Jersey R. R. Co. 101 U. S. 71; 25 L. Ed. 951.

Penn. Ry. Co. vs. St. Louis Ry. Co. 118 U. S. 290; 30 L. Ed. 83.

Snell vs. City of Chicago, 152 U. S. 191; 38 L. Ed. 408.

O. R. N. Co. vs. O. R. Co. 130 U. S. 1; 32 L. Ed. 837.

Gibbs vs. Gas. Co. 130 U. S. 396; 32 L. Ed. 979.

The authorities relied upon by appellant in the Court below concerning the questions involved in this case are clearly distinguishable upon the facts, as it will be noticed that they are cases where the Courts had before them the consideration of contracts or ordinances possessing all the elements of a contract for a definite period. Our attention was especially called to the Walla Walla case, 172 U. S. 1, by appellant as settling the question of its having a franchise. The Court will discover upon an examination of that case that there was an express agreement on the part of the city of Walla Walla not to build water works of its own during a period of twenty-five years, the terms of the contract. No such ordinance or question was presented in that case as is in the case at bar.

In presenting the controlling questions in this case we have endeavored to draw the distinction recognized by the authorities between a corporation having an express contract or franchise for a definite period of time and possessing all the elements of a contract with a municipality for the use of its streets, and where a corporation having

merely permission to lay water pipes in the streets for an indefinite time which is a license subject to the payment to the city of compensation for a continuation of the privilege thereby granted. It is manifest that there is a clear distinction in this regard, and also between grants conferred directly by the Legislature and those which come from the local authorities of a municipality.

The opinion of the learned Judge in the Court below in deciding these questions is a clear and correct exposition of the law to which we specially call the Court's attention.

Respectfully submitted,

CHARLES M. KAHN,
CHARLES P. McCARTHY,
CHARLES C. CAVANAH AND
JOHN J. BLAKE,

For Appellee.

WILLIAM E. BORAH,

Of Counsel.

Dated Boise, Idaho, January 16, 1909.

Office Supreme Court, U. S.
FILED.
MAR 18 1909
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 131.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, APPELLANT,

vs.

BOISE CITY.

OPINION OF THE SUPREME COURT OF IDAHO IN THE CASE OF BOISE CITY NATIONAL BANK vs. BOISE CITY. FILED FEBRUARY 18, 1909.

CHARLES M. KAHN,
Counsel for Appellee.

(20,794)

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

NOVEMBER TERM, 1908.

BOISE CITY NATIONAL BANK, APPELLANT,

vs.

BOISE CITY, RESPONDENT.

Filed February 18, 1909. I. W. Hart, Clerk.

ORGANIZATION OF MUNICIPAL CORPORATIONS—UNDER GENERAL LAWS—UNDER SPECIAL CHARTERS—AMENDMENT OF—BY SPECIAL LAW—BY GENERAL LAW—CONSTRUCTION OF SEWERS—PAYMENT OF—ISSUANCE OF BONDS—TAXATION—SPECIAL ASSESSMENTS—PAYMENT OF BY INSTALLMENT.

1. Under the provisions of Sec. 2, Art. XXI, of the Idaho Constitution, the special charters under which certain cities in the State had been incorporated, were continued in force.
2. Under the provisions of Sec. 1, Art. XII, of the Constitution, the legislature is empowered to enact general laws for the incorporation and classification of cities and towns, and it is also provided in said section that cities and towns theretofore incorporated under special charters may become organized under such general laws whenever a majority of the electors at a general election shall so determine, under such provisions of law as may be enacted by the legislature.

3. The special charter of Boise City, as amended and re-enacted in 1907, contains all of the powers that that city has in regard to the construction of sewers and the method of levying assessments and collecting taxes for the payment of such sewers.
4. The powers of Boise City in regard to creating an indebtedness and paying the same, and the method and manner of doing so, must be determined by the provisions of its charter.
5. An act providing for the issuance of bonds for improvement of streets and laying of sewers in incorporated cities, towns and villages, and for the payment of the cost of such improvements, etc., etc., approved February 24, 1905 (Sess. Laws 1905, p. 297), is a general law applicable to cities, towns and villages that have been incorporated under the general law of the State, and is not applicable to cities incorporated under special charter.
6. The special charters of the cities of this State cannot be amended by general laws.

(Syllabus by the Court.)

Appeal from the District Court of the Third Judicial District in and for Ada County. Hon. Fremont Wood, Judge.

Action to Determine the Validity of Certain Bonds Issued in Payment for the Construction of Sewers. Judgment for the Defendant. *Reversed.*

L. F. Clinton and Johnson & Johnson for appellants.
Chas. M. Kahn, city attorney, for respondent.

SULLIVAN, *C. J.:*

This action was commenced by the appellant, the Boise City National Bank, to test the validity of a proposed issue by the respondent city of lateral sewer improvement bonds of

Sewer Districts Nos. 104, 105, and 106, amounting to $50,000. The respondent city now is and for a long time prior to the adoption of the State Constitution was operating under a special charter, which has been amended several times by special acts of the legislature. The special charter of Boise City was originally passed and approved January 11, 1866, and was amended by act of March 11, 1903, and again on February 22, 1907, the charter of Boise City was re-enacted and amended and what is known as the charter of 1907 went into force and effect. While operating under the charter of 1907, the city authorized the issuance of local improvement bonds for the lateral sewer districts above mentioned, for the sum of $50,000, and advertised for bids therefor and the bid of the appellant for said bonds was accepted, the appellant accompanying said bid with a certified check for $2,500 as an evidence of good faith. After the bid of appellant had been accepted, the appellant bank refused to accept the bonds, contending that the same were invalid and requested the return of the check. The city refused to return the check, and the present action is the outcome of that controversy, to recover judgment against the city for the return of said certified check.

The respondent city answered, setting forth all of the facts in regard to said transaction. Thereupon counsel for the city made a motion for judgment on the pleadings on the ground and for the reason that from the complaint and answer it appeared that the respondent city was authorized by the act of the legislature to issue said bonds, which motion was granted and judgment accordingly entered. This appeal is from the judgment.

On the 24th of February, 1905 (Sess. Laws 1905, p. 297), the legislature passed an act entitled "An act to provide for the issuance of bonds for improvement of streets and laying of sewers in incorporated cities, towns, and villages, and for the payment of the cost of such improvement and laying of sewers by installments, and making the provisions hereof ap-

plicable to cities, towns, and villages which have levied special assessments for improvements or for laying sewers." Said bonds were issued or were to be issued under the provisions of said act. That act being a general law, it is contended by counsel for appellant, does not apply to Boise City, and that the Boise City authorities have no power to issue bonds under the provisions of said act. It is contended that the amendment to the Boise City charter of February 22, 1907, under which the city is operating, was passed since said general act of February 24, 1905, and provides a complete system for building sewers, assessing the property benefited, and collecting from the property-owners the cost thereof, and provides also that this method of collection shall be exclusive; while it is contended by respondent that the said bonding act of 1905 was intended as an aid to cities operating under special charters, in making improvements and to relieve the hardship of the taxpayers in paying such assessments at one time, for the reason that Sec. 10 of said act expressly provides that nothing in that act shall be construed as repealing or modifying any existing laws prescribing the method by the means of which cities, towns, and villages having more than one thousand inhabitants, whether organized under special charters, local laws, or general incorporating acts, may make improvements and lay sewers, and that such act shall be construed as additional and confirmed authority.

The real question presented for decision is whether the provisions of the Boise City charter of 1907 in regard to constructing sewers and assessing the property benefited and collecting from the property-owners the cost thereof, is the law by which those matters must be done or whether that charter is supplemented by the act of 1905 and the provisions of that act must be construed as additional authority conferred on Boise City. There is no express repeal of the provisions of the act of 1905 in said 1907 charter, and the main question presented is, Should the act of 1905 be construed as additional authority to the city in the issuance of sewer

bonds, or must the action of the city in that regard be controlled by its charter provisions?

We have in this State cities which were organized under and granted certain powers, by special charters, enacted by the legislature prior to the adoption of our State Constitution. Sec. 2 of Art. XXI of our State Constitution continued such special charters in force after the Constitution went into effect. We have other cities that have been organized under the general municipal corporation law of the State. Section 1, Art. XII, of the Constitution, provides, among other things, that the legislature shall enact general laws for the incorporation and classification of cities and towns, and that cities and towns theretofore incorporated under special charters may become organized under such general laws whenever a majority of the electors at a general election shall so determine under such provisions of law as may be enacted by the legislature. Boise City has never become organized under the general laws of the State, but has continued to exist and do business under the powers granted it by its special charter.

It is contended by counsel for appellant that the city charter, as amended and re-enacted in 1907, contains all of the powers that the city has in regard to the construction of sewers and the method of levying assessments and collecting taxes for the payment of such sewers; while it is contended by counsel for respondent that the city charter is not as full and complete as it ought to be in regard to the making of improvements and laying of sewers, and that the bonding act of 1905 supplements the charter and must be construed as additional authority for levying assessments and the collection of the same, and for the payment of the same in installments and issuing bonds therefor. Section 48 of the charter provides the manner in which all special assessments for certain purposes must be made, and provides that whenever any special assessment is levied, it shall be the duty of the clerk to prepare a special assessment roll and to collect said assess-

ments. Under the general law of 1905, it is provided that such assessments may be paid in ten annual installments and that bonds may be issued therefor. The city proposes to issue the bonds involved in this suit under said general law.

Counsel for the city also contends that said general law of 1905 is made for the benefit of all cities operating under a special charter, as well as those organized and operating under the general law. We cannot agree with that contention. It is true the legislature attempted by Section 10 to make said general law applicable to cities organized under a special charter, but that could not be done, for the reason that special charters cannot be amended by general laws. The special charter of Boise City prescribes the method, manner, and means of constructing improvements, such as sewers, and provides how the assessments therefor must be made and the tax collected for the payment of the same. That being true, the method there prescribed must be followed, and the method there provided cannot be superseded by the general law.

Under the provisions of Sec. 1 of Art. XII of the Constitution, it is provided that cities and towns theretofore incorporated may become organized under the general laws whenever the majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the legislature. This clearly indicates that cities incorporated by special charter do not come under the general laws of the State until the majority of the electors of such city at a general election for that purpose shall so determine. We think it clear that the powers of Boise City in regard to creating indebtedness and paying the same, must be determined by the provisions of its charter and not by the provisions of said bonding act of 1905, which is a general law applicable to all cities incorporated under the general law for incorporating towns and cities.

It is contended by counsel for the city that the bonding act of 1905 is not inconsistent with the new charter of 1907,

but merely goes further and gives additional powers, which, it is contended, are a benefit to the people. This court cannot consider whether the provisions of said bonding act would be a benefit to the people of Boise City or not. We are called upon to determine the authority of the council of Boise City to issue such bonds in the mode and manner proposed. In 1907, two years after the bonding act of 1905 had been enacted, the legislature amended and re-enacted the Boise City charter, and if it had intended that the city should have the power granted by the act of 1905, it should have incorporated such power into the Boise City charter, as was done in the act amending the City of Lewiston special charter passed at the same session of the legislature. (See Laws 1907, p. 429, Secs. 180, 182.)

It is also contended by counsel for the city that the provisions of the city charter are not complete on the subject of assessments for sewers, and that the statute of 1905 is needed to supplement them. It is true that the Boise City charter does not provide for the payment of sewer assessments in installments, nor provide for the issuance of bonds, but if that were desirable for Boise City, the legislature should have amended the charter, as the special charter cannot be amended by a general law such as the act of 1905. The charter provisions are sufficiently complete so that sewers in said districts were long since completed and a great many of the property-owners have paid their share of the costs of constructing them, and the matter is closed so far as they are concerned. It appears that the special charter of 1907 for the government of Boise City only, is complete in itself and under it all of the sewers in said districts were constructed. Section 48 of said charter provides the manner in which all special assessments for constructing sewers and for other purposes shall be made, but it fails to provide, as does the act of 1905, for the payment of the cost of construction in ten consecutive years and for the issuance of bonds therefor, and it is well settled that where a later statute provides a complete

method by which a city may provide for the construction of a public improvement, and also provides the manner of levying and collecting the assessment to pay for the improvement, the later law will operate as a substitute for the earlier act, and if anything in the earlier act is omitted, the legislature will be presumed to have intentionally omitted it. The same legislature and during the same session that it incorporated into the City of Lewiston charter the provisions of the law of 1905 in regard to the manner of paying for sewer improvements, also amended the Boise City charter and left out of the Boise City charter the provisions of the general law of 1905, and it cannot be presumed that it unintentionally omitted those provisions. The charter and the ordinances passed in pursuance of it, providing for the collection of the assessments by the clerk, do not provide for the division of the assessments into ten annual installments and the issue of bonds as is provided by the act of 1905. It clearly appears that the law of 1905 is inconsistent with the last amendment of the special charter of Boise City, as it contains matter not contained in the special charter. In the last amendment to the Boise City charter, made in 1907, the legislature re-enacted the former charter with some amendments, omitting, however, to include any of the provisions of the general law of 1905, and if the intention was to make it a part of the new charter, it should have been included. We think that the omission was intentional. That being true, the provisions of the general law of 1905 should not apply to the new charter. The principle of law involved is the same as when a statute is revised or amended, and some part of it omitted. The part of it left out is superseded and repealed, and when one act is framed for another, some parts being omitted, the parts omitted are not to be revived by construction, but must be considered as annulled (Ellis *v.* Paige, 1 Pick. (Mass.), 43; Buck *v.* Spofford, 31 Me., 34; Combined Saw & Planer Co. *v.* Flournoy (Va.), 14 S. E., 976).

Where there is a special statute relating to a particular subject, the special statute will control even as against a general statute of a later date (Lawyer *v.* Carpenter (Ark.), 97 S. W., 662). We do not think the question of the repeal by implication of the general law of 1905 by the new charter of 1907 arises in this case, as the provisions of the special charter were purposely framed to cover cases like the one at bar, while the general act of 1905 applies to cities and towns organized under the general law and not to those under special charters. The State Constitution contemplates that special charters shall be amended by special acts only, and the general laws relating to the local government of the city cannot be made to apply to Boise City without the consent of a majority of the electors. This court had under consideration said provisions of the Constitution in the cases of Wiggin *v.* City of Lewiston, 8 Ida., 527, and Butler *v.* City of Lewiston, 11 Ida., 393. The former case was brought to test the validity of certain bonds of the city of Lewiston, and the court gave effect to the provisions of the special charter of the city of Lewiston, and not to those of the general law. The latter case involved the legality of a bond issue. The court held that Sec. 2 of Art. XXI of the Constitution continued the special charter of Lewiston in force, and that the power of the legislature to amend said special charter by special act was left unimpaired, and that cities operating under special charters can only avail themselves of the general incorporation laws by a majority vote of the electors, when the legislature provides the specific method required by the Constitution to be provided, which had not at that time been done.

Section 6 of Art. XI of the Constitution of California is the same as Section 1 of Art. XII of our State Constitution except that for many years it contained the following clause at the end of the section: "And cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws." In Desmond *v.* Dunn,

55 Cal., 242, decided while said quoted clause of the Constitution was in force, the court said:

"To us the general intention to emancipate municipalities as far as it consistently could be done, from the control of the legislature, is apparent; and we cannot hold that general laws for the government of such municipalities can take effect in any of them, until a majority of the electors so determine, without violating not only the spirit, but likewise the plain letter of the Constitution. The intention being clear, it is our duty to give effect to it."

As shedding some light upon this question, see also the concurring opinion of Mr. Justice Ross in Wood *v.* Election Commrs., 58 Cal., 561; Staude *v.* Election Commrs., 61 Cal., 313; *In re* Guerrero, 69 Cal., 88; Thomason *v.* Ashworth 73 Cal., 73.

The evil effect of the last clause of Sec. 6, Art. XI, of the Constitution of California, in permitting general laws relating to purely municipal affairs of local concern, to be made applicable by the legislature to cities operating under special charters without their consent, was necessarily very great. This is precisely what defendant's contention would lead to in this case, under the same constitutional provisions except that the provision of our Constitution does not contain the last clause of said Sec. 6, Art. XI, of the California Constitution. At the general election held November 3, 1906, in California, the last clause of said section was amended to read as follows: "And cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws." This amendment leaves the constitutional provisions of California relating to municipal charters substantially the same as that of Idaho, and under it the Supreme Court of that State has ever since held that in matters of local government of "municipal affairs" no general law can be made to apply (Fritz *v.* San Francisco, 132 Cal., 373; McHugh *v.* San Francisco, 132

Cal., 381). In Wichmann *v.* City of Placerville, 147 Cal., 162, it was held that the proper rule of construction was that the charter was the measure of the powers of the municipality. In the case at bar it is clear that the construction of sewers and the levying of assessments for the payment therefor are matters of local concern in which the local community is alone interested, and in which the State at large has no special interest.

If the legislature has the power under the Constitution of Idaho to make the general bonding act of 1905 relating to internal governmental affairs of cities and villages apply to Boise City by merely inserting in that act a section to that effect, then the legislature may make the general act governing cities, towns, and villages throughout the State, or any part thereof, apply in the same manner without a consent of the majority of the electors, as is required by Sec. 1 of Art. XII of the Constitution. If the legislature could do that, it would annul said provision of the Constitution entirely. To permit the legislature to amend special charters of cities in matters of local government by general laws would be contrary both to the letter and spirit of the Constitution. This court held in McDonald *v.* Doust, 11 Ida., 14, that acts inconsistent with the spirit of the Constitution are as much prohibited as are acts specifically enumerated and forbidden therein (The City of Lexington *v.* Thompson, 113 Ky., 540; 57 L. R. A., 775; 101 Am. St., 361).

The special charter of Boise City is recognized and continued in force by the Constitution, and a method of amending it by special law is clearly contemplated by the Constitution. All of the limitations upon the legislature in regard to special legislation are found in Sec. 19, Art. III, of our Constitution (Butler *v.* City of Lewiston, 11 Ida., 393). We have no provision in our Constitution such as is found in the constitutions of some other States, to the effect that no special laws shall be passed where general laws can be made applicable. It follows, therefore, that these special charters

may be amended by special laws to meet the requirements of growing cities, but cannot be amended by general laws.

The act of February 24, 1905, is an example of how general legislation could be made to affect cities under special charters without the attention of the people of the city or even the members of the legislature ever being called to that fact, because no reference to its application to such cities is mentioned in the title of the bill. There is nothing in the title of this act which would indicate that it is proposed to affect or amend the charter of Boise City. The title of the act of February 24, 1905, indicates that it is a general law providing for the issuance of bonds of incorporated cities, towns, and villages organized under the general incorporation laws of the State. The title is general, while in section 10 of said act it is provided that said act shall be construed as additional and confirmed authority to cities under special charters; that part of said act is void because it is not embraced in the title, and if it were embraced in the title it could not affect Boise City, as above shown.

We therefore hold, under the various provisions of our Constitution above quoted, that the legislature cannot amend the special charter of Boise City by a general law. Such amendment can only be made by special laws.

The judgment is therefore reversed and the cause remanded with instructions to enter judgment in favor of the appellant, as prayed for in the complaint. Costs are awarded to the appellant.

Stewart and Ailshie, JJ., concur.

IN THE SUPREME COURT OF THE STATE OF IDAHO.

FEBRUARY TERM, 1909.

BOISE CITY NATIONAL BANK, *Appellant,*
vs.
BOISE CITY, *Respondent.*

I, I. W. Hart, clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion filed in the above-entitled cause on the 18th day of February, A. D. 1909, and now on file in my office.

Witness my hand and the seal of the court this 5th day of March, A. D. 1909.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*
By —— ——,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the State of Idaho. Boise City National Bank, appellant, *vs.* Boise City, respondent. Filed Feb. 18, 1909. I. W. Hart, clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 391.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, Appellant,

vs.

BOISE CITY.

Supplemental Brief and Argument of Appellee.

Appeal from the Circuit Court of the United States for the District of Idaho.

Since the filing of appellee's brief and argument, a decision has been rendered by the Supreme Court of Idaho in the case of Boise City National Bank vs. Boise City (not yet reported), which to our mind has a direct bearing on the present case before your Honors, and which makes it necessary for counsel to raise a question not brought out in their main brief. The question we desire to raise is, Have Sections 2710 of the Revised Statutes of Idaho and Sections 2711 and 2712 of the Revised Statutes of Idaho, as amended by the Act of March 9, 1905, any application to Boise City, Idaho? We believe that under the recent decision of the Supreme Court, above referred to, these

three sections have absolutely no application, either directly or indirectly, upon the charter or any ordinance of Boise City, Idaho.

In the case decided by the Supreme Court of the State of Idaho, February 18, 1909, above cited, the facts were these: Under and by virtue of an act of the Legislature of February 24, 1905, Boise City, by an ordinance, had provided for the issuance of local improvement bonds. The act of 1905 provided that in all cases where assessments had been levied in incorporated cities, towns and villages of the State of Idaho, the city council or board of trustees of such cities, towns or villages might permit the owners of property to make application to pay their assessments in ten annual installments and to issue district improvement bonds to cover the amount of such applications. Section 10 of that act provided that said act should apply to cities operating under special charters. The Supreme Court of the State of Idaho, in the decision above referred to, held that this act could not be made to apply to Boise City, Idaho, for the reason that Boise City was operating under a special charter, and no amendment could be made to that charter by any general law, and pointed out that any change desired in said charter must be made by a direct amendment to said charter.

In that case the Court said:

"If the Legislature has the power under the Constitution of Idaho to make the general bonding act of 1905, relating to internal governmental affairs of cities, apply to Boise City by merely inserting in that act a section to that effect, then the Legislature may make the general act governing cities, towns and villages throughout the State, or any part thereof, apply in the same manner with-

out the consent of the majority of electors, as is required by Section 1 of Article XII of the Constitution. If the Legislature could do that, it would annul said provision of the Constitution entirely. To permit the Legislature to amend special charters of cities in matters of local government, by general laws, would be contrary both to the letter and spirit of the Constitution."

The Court says:

"It follows, therefore, that these special charters may be amended by special laws to meet the requirements of growing cities, but can not be amended by general laws."

The Court further says:

"We therefore hold, under the various provisions of our Constitution, above quoted, that the Legislature can not amend the special charter of Boise City by a general law. Such amendment can only be made by special law."

Sections 2710 of the Revised Statutes of Idaho and Sections 2711 and 2712 of the Revised Statutes of Idaho, as amended by the act of March 9, 1905 (Exhibit B 1, folis 18-20, transcript of record) are general laws. They do not even attempt to go as far as the bonding act under consideration by the Court below and make no provision that they shall apply to cities operating under special charters. This being so, we contend:

1st. That the attempt of counsel to read into the various franchises before this Court the provision of Section 2710 of the Revised Statutes of Idaho that such grant was for a period of fifty years must fail and be of no force or effect for the reason that said statute is a general law and that said franchises were all granted by reason of the power conferred by the charter of Boise City, Idaho, and that having no period of duration fixed in them, must nec-

essarily be but a license, and would all be subject to the construction placed upon them by Judge Gilbert in the case of Boise Artesian Hot & Cold Water Company, Limited, vs. Boise City, 123 Fed. 232, and that such grants can be nothing more than licenses subject to such restrictions as the common council may deem fit to impose upon them.

2d. That Sections 2711 and 2712, which attempt to provide methods for fixing rates, being general in their nature, can have no application to Boise City, Idaho; and that appellant's allegation that there is now due and owing to it the sum of two thousand dollars for water furnished in accordance with the conditions and under the rates fixed by commissioners appointed under such general statutes, being predicated upon said statutes, which we contend have no application to Boise City by reason of their being general laws, must fail.

Certainly the statute relating to the contract and franchise of water companies in the city and those regulating manner of fixing rates must be held to relate to both internal governmental affairs of cities and matters of local government, and so come directly under the decision of the Supreme Court of the State of Idaho in the case of Boise City National Bank vs. Boise City, above referred to.

Respectfully submitted,

CHARLES M. KAHN,
CHARLES P. McCARTHY,
CHARLES C. CAVANAH,
JOHN J. BLAKE,

For Appellee.

WILLIAM E. BORAH,

Of Counsel.

BOISE ARTESIAN HOT AND COLD WATER COMPANY *v.* BOISE CITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 131. Argued March 17, 1909.—Decided April 5, 1909.

Equity will not interpose where there is a remedy at law which is as complete, practicable and adequate as equity could afford.

As the defense of the unconstitutionality and illegality of a tax is open in a court of law, injunction should not issue against the enforcement of the tax merely because it is unconstitutional or illegal unless other circumstances bring the case within some clear ground of equity jurisdiction.

Even though some States may for convenience of remedy permit equity to enjoin the collection of a tax for mere illegality, courts of a different and paramount sovereignty should not do so, and Federal courts should not interfere by injunction with the fiscal arrangements of a State if the rights involved can be preserved in any other manner.

A municipality speaks through its council, and where the bill does not allege any facts showing threats to remove property of a complainant public service corporation such action will not be presumed so as to give equity jurisdiction.

A suit at law by a municipality to collect a license fee imposed by ordinance on a public service corporation contemplates continuance, and not restraint, of the business of such corporation, and, as the defense of unconstitutionality of the ordinance is open in that suit, equity should not interfere.

In order to make the fear of multiplicity of suits a ground for the interposition of a court of equity, more than one suit must have been commenced, and the court should not interfere unless it is clearly necessary to protect complainant from continued and vexatious litigation.

Equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected by a suit at law in which the defense of its illegality is open, and it does not appear that the tax is a lien on any of complainant's property.

THE facts are stated in the opinion.

Mr. Richard H. Johnson, with whom *Mr. Edgar Wilson* and *Mr. Richard Z. Johnson* were on the brief, for appellants:

An injunction should have been issued by the court below restraining the city from enforcing the ordinances, and from interfering with plaintiff's use, according to its franchises, of the streets and alleys. The bill made out a proper case for the interposition of a court of equity. It shows that the city maintains and insists that the water company's right to use the streets is a license only, which is subject to annulment and revocation at the will of the city, and that the city authorities have the right to compel the water company to discontinue the use of the streets and alleys, or to levy burdens and assessments for such use, at their pleasure, and that the city threatens and intends to impose further burdens and assessments on the water company for such use and to interfere with its use of the streets and alleys and has threatened to remove its pipes therefrom and its water works from the city.

The bill also alleged as additional grounds the unconstitutionality of the ordinance; the monthly presentation of bills, threats of suit, and the presentation of another bill after the suit had been commenced, showing danger of multiplicity of suits. It was also averred that the ordinances cast clouds upon the water company's franchises and depreciate the value of its property, impair its credit, embarrass its business and reduce its net revenue to an unfair and unjust extent which will amount to confiscation of its property; and, moreover, that the enforcement of those ordinances will destroy the water company's franchises and contract rights in violation of Art. I, § 10 of the Federal Constitution, and will deprive it of its property without due process of law, and deny it the equal protection of the laws.

As the ordinances which the city is seeking to enforce are in violation of the water company's contract rights and are otherwise unconstitutional, an injunction against their enforcement is the proper remedy. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453;

Detroit v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 378–381. See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

Mr. William E. Borah and *Mr. Charles M. Kahn*, with whom *Mr. Charles P. McCarthy*, *Mr. Charles C. Cavanah* and *Mr. John J. Blake* were on the brief, for appellee:

The facts stated in the bill of complaint are insufficient to entitle plaintiff to any relief in, or to give jurisdiction to a court of equity.

Under the allegations of the bill the plaintiff has an adequate remedy at law.

The bill shows that plaintiff's sole object is to secure a decree of the court declaring the ordinances to be franchises for a period of fifty years; that the ordinance requiring the plaintiff to pay a license fee be declared void, for a recovery of $2,000.00, with interest, for the use of water from its system, and declaring the rates established by the water commission, relating to said use be valid.

An action at law is, at this time, pending in the state court of Idaho, by the city against the company for the recovery of $1,730.00, alleged to be due as such license fee. In that action at law, the plaintiff can present to the court all questions as to the validity of the ordinances and whether it has a franchise to use the streets for fifty years. The plaintiff could, in said action at law, either set up its claim for $2,000.00 as a counter claim in the event the court held the license fee valid, or institute an independent action in a court of law for the recovery of said amount, as the city, under the allegations of the bill, seems to be solvent.

Where the relief prayed for is such as a court of law is competent to grant, a court of equity has no jurisdiction.

Suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law. 1 Stat. 82; Rev. Stat. § 723. And see *Hipp* v. *Babin*, 19 How. 271; *Fussell* v. *Gregg*,

113 U. S. 550; *Phœnix Mutual Life Insurance Co.* v. *Bailey*, 13 Wall. 616; *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205.

It appears from the bill in this case that the plaintiff is seeking to restrain the defendant from proceeding with an action at law in the Idaho state court, brought to recover a certain sum alleged to be due as a license fee under the ordinance of June 7, 1906. In such a case a Circuit Court of the United States will not interfere to enjoin a pending suit at law. *Hapgood* v. *Hewitt*, 119 U. S. 234; *Buzard et al.* v. *Houston*, 119 U. S. 351. See also 1 High on Injunctions (3d Ed.), §§ 89–93.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellant, a West Virginia corporation, brought in the Circuit Court of the United States for the District of Idaho, this bill in equity against Boise City, a municipal corporation. There was a demurrer to the bill, which, upon consideration of the merits of the case set forth therein, was sustained by the judge of the Circuit Court and the bill dismissed. The company appealed directly to this court. The facts set forth in the bill and exhibits, and the relief and grounds of relief claimed, so far as necessary to develop the point decided, may conveniently be stated in narrative form.

The company was incorporated for and is engaged in supplying the city and its inhabitants with water for municipal and domestic purposes. It had acquired the property, franchises, rights and privileges of certain individuals and corporations, who had been, from time to time, granted by ordinance of the city the privilege of laying and maintaining pipes in the streets and supplying through them water for municipal and domestic uses. The company conducted its business by virtue of these ordinances, and has invested large sums of money. The ordinances need not be set forth in detail, and it is enough to say that the company contends that they are franchises for a term of not less than fifty years, and constitute a contract incon-

sistent with the license fee or tax hereafter referred to, while the city contends that they are mere permissions, revocable at any time. The rates are fixed by commissioners, acting under the authority of a law of the State, and are to remain in force three years from the date of their establishment. After the fixing of the rates and before the expiration of the three years, on the thirty-first day of May, 1906, the city enacted an ordinance requiring that the company "hereafter pay to said Boise City, on the first day of each and every month, a monthly license of $300, for the privilege granted . . . to lay and repair water pipes in the streets and alleys of said city." The ordinance then made a demand for the monthly payment of said license, and directed the city clerk to notify the company of the requirements of the ordinance.

The main object of the bill is to obtain an injunction against the enforcement of this ordinance, upon the grounds: (1) that other corporations, associations and individuals using the streets and alleys of the city for various purposes are not required to pay a license, and therefore there was, by the ordinance, a denial of the equal protection of the laws; (2) that the city, in pursuance of its claim that the ordinances grant only a revocable permission to occupy the streets, threatens and intends to impose further burdens and assessments, and threatens to remove the pipes and the works from the city; (3) that the city has presented monthly bills and has brought an action at law in the state court to recover the amount alleged to be due on account of the license fee imposed, and that there is therefore danger of a multiplicity of suits; (4) that the ordinance has cast a cloud upon the company's franchises and right to supply water to the city and its inhabitants, and thereby depreciated the value of the company's property, impaired its credit, embarrassed its business and confiscated its property; (5) that the ordinance impairs the obligation of the contract made by the ordinances granting the rights, privileges and franchises; (6) that the enforcement of the ordinance would deprive the company of its property without due process of law and abridge its privileges

and immunities granted by the Fourteenth Amendment; (7) and that the ordinance violates the constitution and laws of the State.

A subordinate object of the bill is to recover from the city certain amounts due on account of water supplied to fire hydrants, which the city declines to pay, disputing its liability so to do.

The decree of the court below, dismissing the bill, proceeded upon a consideration of the merits of the controversy between the parties. We do not enter upon that subject, because there is a deeper question which seems to us decisive of the case. That question is whether the plaintiff is entitled, on the allegations of its bill, to relief in equity in the Federal courts.

It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional and void. All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law. This rule at an early date was crystallized into statute form by the sixteenth section of the Judiciary Act (Revised Statutes, § 723), which, if it has no other effect, emphasizes the rule and presses it upon the attention of courts. *New York &c. Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214. It is so well settled and has so often been acted upon that no authority need be cited in its support, though it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 11.

A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit

its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. *Insurance Co.* v. *Bailey*, 13 Wall. 616, 623.

In order to give equity jurisdiction there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on the subject is *Dows* v. *Chicago*, 11 Wall. 108. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the state law, and that the property was not within the jurisdiction of the State. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

"The illegality of the tax and the threatened sale of shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on

their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

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"No Court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a Court of equity can be invoked."

This case has been frequently followed and its governing principle never doubted. *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *State Railroad Tax Cases*, 92 U. S. 575, 613; *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525, 526; *Milwaukee* v. *Koeffler*, 116 U. S. 219; *Pittsburgh &c. Ry. Co.* v. *Board of Pub. Works*, 172 U. S. 32; *Arkansas Building &c. Association* v. *Madden*, 175 U. S. 269.

In the case last cited, Mr Chief Justice Fuller made the following important observation (p. 274):

It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding."

In *Shelton* v. *Platt*, 139 U. S. 591, a bill was filed in the Circuit Court of the United States to restrain the collection of a license tax imposed by the State of Tennessee on the United States Express Company, upon the ground that it was unconstitutional. The bill alleged that the property of the company was employed in interstate commerce and was necessary to the conduct of it, and that if it were seized by the sheriff it would greatly embarrass the company in the conduct of its interstate business, subject it to heavy damage and the public to great

loss and inconvenience, and that the company was without adequate remedy at law. A plea alleged that the only remedy under the laws of the State was to pay the taxes under protest and bring suit to recover them back. The plaintiff had an injunction from the lower court. This court reversed the decree upon appeal, upon the ground that the remedy in equity would not lie merely because the tax was unconstitutional, unless there were allegations in the bill otherwise bringing the case within some acknowledged head of equity jurisdiction, and that the allegations of the bill were not sufficient to do this. This case was followed in *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, and in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, where a tax was alleged to be unconstitutional because imposed upon interstate commerce, because it denied to the taxpayer the equal protection of the laws, and because it was void for repugnancy to the constitution of the State.

A brief reference to some cases cited by the company, in which this court has asserted the authority of equity to interfere, will define the rule quite as well as the cases in which the court has declined to exercise the power of injunction. In *Walla Walla* v. *Walla Walla Water Co.*, *supra*, the city was about to construct, in violation of its contract, a competing water plant, and the resulting damage to the company would have been irreparable. The same conditions existed in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65. See same case, 202 U. S. 453. In *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, a schedule of rates for transportation of passengers was fixed in violation of the contract rights of the company, and possible suits would be limited only by the number of passengers. The same condition existed in *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517; and see *Ex parte Young*, 209 U. S. 123, where the grounds of the jurisdiction in equity in rate cases are fully set forth and discussed. In *Ogden City* v. *Armstrong*, 168 U. S. 224, not only was there danger of a multiplicity of suits, but the tax there in question was a lien upon realty and a cloud on the title.

It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.

These decisions make it clear that an injunction ought not to be granted unless the bill, besides alleging illegality and unconstitutionality of the ordinance imposing the license fee, sets forth other circumstances which bring the case within some acknowledged head of equity jurisdiction. The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises.

But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties.

It is true that the bill contains a vague allegation that the city has threatened to remove the company's pipes and works from the city, but no facts whatever are alleged showing such a threat. The city does not speak except by its council, and nothing has been said or done by it in this direction. On the contrary, the imposition of the license fee and the bringing of a suit for its recovery contemplate continuance and not restraint of the business of the company.

Nor do we think that there is any danger of a multiplicity

of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pomeroy's Eq. Juris., 3d ed., § 254. Perhaps it might be necessary to await the final decision of one action at law (see for analogies *Sharon* v. *Tucker*, 144 U. S. 533; *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632), but that we need not decide.

Nor do we think that the ordinance casts a cloud upon the title of the company to its franchises. It is not a lien upon them or upon any other property of the company. The city's only remedy is that which it has employed—an action at law for the collection of the license fee. The plaintiff's real point here is, not that the ordinance imposing a license fee casts a cloud upon its title, but that the reason alleged to have induced the ordinance, namely, the city's claim that the company has no more than a mere permission to occupy the streets, unfavorably affects its property and impairs its credit. But we cannot restrain a belief or an expression of it and are not asked to. We are asked only to restrain an ordinance which in no way fixes a lien or cloud upon the plaintiff's title. It is possible that the ordinance imposing the license fee could be sustained, without passing upon the nature of the company's tenure of its privileges. On the other hand, it might be condemned without regard to that consideration.

Here is a case where every possible defense to the collection of the license fee, which has been suggested by the company, is available to it in the action at law pending in the courts of the State of Idaho, and there is no reason whatever shown why the law should not take its course. Presumably, the company, on the ground of diversity of citizenship, might have removed the case from the state court to the Circuit Court of the United States, if the attempt had been seasonably made. If, however, the litigation continues up to the court of final resort of the State of Idaho, and all claims under the Constitution of the United States are seasonably and properly made in the state courts and are denied, then the company would be entitled to a review by this court of the judgment of the state court.

The attempt to recover the hydrant rentals is so clearly a matter for a court of law that nothing need be said of it.

The Circuit Court dismissed the bill for entirely different reasons than those which have influenced us. We neither approve nor disapprove those reasons nor intimate any opinion whatever upon the questions passed on by the Circuit Court. It would be superfluous formalism to reverse the decree of the court below and remand the case to that court, with instructions to dismiss the bill for the reasons given in this opinion, for that court has already dismissed the bill. Therefore, the decree of the court below is

Affirmed.